Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

SHEILA HOPPER, ex rel.,
UNITED STATES OF AMERICA,

Petitioners,

v.

WILLIAM ANTON, LOS ANGELES UNIFIED SCHOOL DISTRICT, LEONARD BRITTON, PAUL CARR, PHILLIP CALLISON, JAMES ESTERLE, DEANNE NEIMAN, BENITA CHAUM, CAROL ALBRIGHT, and JACKIE THOMPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions, and no others except for those reasonably contained therein, are presented for review:

Did the Ninth Circuit, in requiring that there be an "intentional, palpable lie" in order to have "knowing" fraud, fail to apply the correct standard under the False Claims Act, which at 31 U.S.C. § 3729(b) defines "knowing" fraud as that for which no specific intent to defraud is required and which may include not only one who has actual knowledge of the information and acts in deliberate ignorance of the truth or falsity of the information, but also one who acts in "reckelss disregard for the truth or falsity of the information"?

Did the Ninth Circuit, in holding that despite the making of actual annual and triennial demands for payment of funds, the Los Angeles Unified School District ("District") makes no "false certifications of compliance" with special education laws, and therefore cannot be liable for making "false claims", improperly restrict the scope of the False Claims Act and the definition of a "claim" thereunder so as to conflict with the legislative history of the False Claims Act and the holdings of such cases as *U.S. v. Neifert-White Co.*, 390 U.S. 228 (1968); *U.S. v. Veneziale*, 268 F.2d 504 (3rd Cir. 1956); *U.S. v. McLeod*, 721 F.2d 282 (9th Cir. 1983); *U.S. v. Jackson*, 845 F.2d 880 (9th Cir. 1988); *U.S. v. Cohn*, 270 U.S. 339 (1926); and *U.S. v. Bornstein*, 423 U.S. 303 (1976), all of which demand a very broad definition of the scope of the False Claims

QUESTIONS PRESENTED FOR REVIEW – Continued

Act and of a "claim" thereunder, so as to include any demand for payment of funds or acceptance of funds when one knows that one is not entitled to the full amount of those funds?

Does the Ninth Circuit's holding, that the *Individuals with Disabilities Education Act*, 20 U.S.C. § 1400, *et seq.* ("IDEA") does not require certification of compliance with special education laws as a prerequisite to the receipt of federal funding, conflict with the terms and purposes of the IDEA?

Does the Ninth Circuit's holding, that plaintiff Hopper's activities, consisting of investigation and filing of complaints regarding district-wide noncompliance with special education laws and the receipt of funds to which the District may not have been entitled, as well as the filing of an actual non-frivolous action under the False Claims Act, could not as a matter of law constitute protected activity under the False Claims Act of which the District could be aware because the District was ultimately found to have not as a matter of law engaged in conduct actionable under the False Claims Act, hold potential whistleblowers to an improperly high standard for the attachment of protection and conflict with the decisions of other circuits which have interpreted and applied the whistleblower protection provisions of the False Claims Act and other similar citizen enforcement statutes?

QUESTIONS PRESENTED FOR REVIEW – Continued

Did the Ninth circuit improperly reject plaintiff Hopper's request for judicial notice, when the documents sought to be noticed consist of admissions by the defendant District in another action which directly contradict, rebut and/or controvert the "facts" asserted by the District or in the instant action, and which demonstrated the District's fraud on the court in failing to bring the related case and the findings agreed to therein to the court's attention?

Did the Ninth Circuit err in reaching its conclusions in express reliance on key facts it believed to be "undisputed", when in reality those facts actually were explicitly disputed by plaintiff in the District Court in opposition to the District's Motion for Summary Judgment, and were also controverted by the admissions found in the documents sought to be judicially noticed?

PARTIES TO THE PROCEEDING

The following, and no others, are party to the instant proceeding:

Petitioner Sheila Hopper, Relator for United States of America, was the plaintiff below, as well as both appellant and appellee below.

Respondents are William Anton, Los Angeles Unified School District, Leonard Britton, Paul Carr, Phillip Callison, James Esterle, Deanne Neiman, Benita Chaum, Carol Albright, and Jackie Thompson, who were defendants and appellees below. Los Angeles Unified School District and Jackie Thompson were also appellants below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, in order to resolve the conflicts between that opinion and the opinions of other circuits, as well as express statutory provisions.

I.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was issued on July 31, 1996, and is reproduced herein at Petitioner's Appendix App. 1-23. The Opinion appears in the published reports at 91 F.3d 1261 (9th Cir. 1996). The Ninth Circuit Docket Numbers were 95-55273 and 95-55374, and the United States District Court Docket Number was CV-93-2441-HLH.

The subsequent Order by the Ninth Circuit denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc was issued on September 13, 1996, and is reproduced herein at Petitioner's Appendix App. 41-42.

The Order by the Ninth Circuit denying appellant's Request for Judicial Notice was issued May 31, 1996, and is reproduced herein at Petitioner's Appendix App. 24-25.

The October 4, 1994, Order by the United States District Court, Central District of California, granting defendants' Motion for Summary Judgment as to the First Cause of Action for False Claims and denying defendants' Motion for Summary Judgment as to the Second Cause of Action for retaliation under the False Claims Act is reproduced herein at Petitioner's Appendix App. 26-32.

The December 2, 1994, Judgment of the United States District Court, Central District of California, in favor of plaintiff Sheila Hopper and against defendants Jackie

Thompson and Los Angeles Unified School District, is reproduced herein at Petitioner's Appendix App. 33-34.

The January 11, 1995, Order denying defendants' Motion to Vacate the Judgment is reproduced herein at Petitioner's Appendix App. 35-36.

The January 23, 1995, Order denying defendants' Motion for Judgment as a Matter of Law is reproduced herein at Petitioner's Appendix App. 37-39.

II.

JURISDICTIONAL STATEMENT

This is an action brought for recovery of federal funds under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and for retaliation against a whistleblower pursuant to 31 U.S.C. § 3730(h).

Jurisdiction was conferred upon the District Court because of the federal question presented by both of plaintiff's causes of action under the federal False Claims Act, and the statutory basis for the District Court's original subject matter jurisdiction is 28 U.S.C. § 1331, 1343, this being an action arising under the Constitution and laws of the United States.

The Court of Appeals had subject matter and appellate jurisdiction over this action under 28 U.S.C. § 1291, and pursuant to the Federal Rules of Civil Procedure Rule 4(a).

The final Judgment by the court below of which petitioner seeks review herein was entered by the United States Court of Appeals for the Ninth Circuit on September 13, 1996, appellant's Petition for Rehearing of the court's July 31, 1996 Opinion being denied on that date. Jurisdiction lies with the United States Supreme Court on Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

III.

STATUTES INVOLVED IN THIS CASE

The statutory provisions involved in this case are: the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, which is reproduced herein at Petitioner's Appendix App. 43-54; the implementing regulations for the Individuals With Disabilities Education Act, 34 C.F.R. Ch. III (7-1-92 Edition), relevant portions of which are reproduced herein at Petitioner's Appendix App. 55-81; the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, relevant portions of which are reproduced herein at Petitioner's Appendix App. 83-131; and California Education Code § 56341, which is reproduced herein at Petitioner's Appendix App. 132-138.

IV.

STATEMENT OF THE CASE

A. Introduction

Plaintiff Sheila Hopper is a "whistleblower" and employee of the Los Angeles Unified School District ("LAUSD" or "District"), one of the largest school districts in the country. Hopper's investigations into the mechanisms for compliance with state and federal special education laws and regulations began when a student, Evangelina De Los Santos, was denied special education services despite the fact that as a fifth grader she could not even write her own name.

Over the course of four years Hopper made both internal complaints to LAUSD and external complaints to both the federal Office of Civil Rights and the California Department of Education, in which Hopper alleged District-wide non-compliance with special education laws and alleged specifically that "The school district receives federal and state funds for special education children. I

believe the school district is receiving monies for these two children and they are not being serviced". [ASER-21[1]] All of her complaints resulted in findings of substantial non-compliance with special education laws, and, for the first time in the District's history, caused an order for *district-wide* corrective action [CR-1, ER-2, 5, 6, 8, 13]

Until she filed complaints regarding the District's special education program, Ms. Hopper had an exemplary record with the District, and her evaluations always showed that her teaching was of the highest caliber. [ASER-2-11, 33-37] Unfortunately, her personnel record was blemished as a result of Ms. Hopper's attempt to correct deficiencies with respect to the operation of LAUSD's special education program. As a result of her complaints about these problems, Ms. Hopper was the victim of retaliation in the form of adverse employment actions, which has caused her career substantial injury, as well as causing her to suffer physically and emotionally.

Plaintiff Hopper filed the instant civil complaint under seal in the United States District Court for the Central District of California, No. 93-2441 HLH, on April 28, 1993. [CR-1] The United States Attorney General declined to intervene in the matter, and the case was released from seal. [CR-7]

On July 26, 1993, LAUSD filed a Notice of Motion and Motion to Dismiss both causes of action of plaintiff's complaint, arguing that the school district makes no

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[1] Citations to the record below are designated herein as follows: App. X = Petitioner's Appendix at page X; CR-X = Clerk's Docket Entry No. X; ER-X = Petitioner's Excerpts of Record before the Ninth Circuit at page X; ASER-X = Appellant's Supplemental Excerpts of Record before the Ninth Circuit at page X; OPN. X = Opinion of the Ninth Circuit at page X.

fraudulent representations with respect to compliance with special education laws[2] but rather merely makes "assurances of good-will" that do not, and could not ever, constitute "false claims". [CR-2, 3, 20, 41] The district court upheld the complaint with respect to the first cause of action for false claims, but dismissed the second cause of action for retaliation under the False Claims Act with leave to amend. [CR-18] Plaintiff timely filed her First Amended Complaint on October 15, 1993 [CR-15], and the retaliation cause of action was upheld on motion to dismiss by defendants. [CR-21-25] All defendants answered both causes of action. [CR-26-27]

B. The Summary Judgment Decision

On October 3, 1994, the district court denied in part and granted in part defendants' motion for summary judgment [CR-74], and a Minute Order setting forth the District Court's conclusions of law and findings of fact was issued by the court on October 4, 1994. [App. 26] The district court upheld plaintiff's second cause of action for retaliation under the False Claims Act, but dismissed the first cause of action for false claims [App. 26-32], a decision with which the Ninth Circuit agreed both in principle and in substance.

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[2] LAUSD is required to comply with the provisions of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; 34 C.F.R. § 104.1, *et seq.*; 34 C.F.R. § 300, *et seq.*; and California Education Code § 56341(b)(2), *et seq.*; non-inclusive.

C. The Trial, Jury Verdict, and Subsequent Appeals

The case proceeded to trial on the issue of retaliation in November of 1994, resulting in a unanimous Special Verdict in which the jury found:

> [P]laintiff Sheila Hopper, in making complaints about special education procedures within Los Angeles Unified School District, to the California Department of Education, and to the United States Department of Education, cause[d] a reasonable and distinct possibility that United States special education funds would be reclaimed by the federal government from Los Angeles Unified School District", and was thereby retaliated against for making such complaint. [App. 144]

The Civil Judgment and Order on the verdict in plaintiff's favor was entered on December 12, 1994, [App. 33; CR-115] and after unsuccessful motions by defendants to vacate and for judgment as a matter of law, plaintiff filed her Notice of Appeal of the grant of defendants' Motion for Summary Judgment on the False Claims issue on February 17, 1995 [CR-151; App. 26], and defendants LAUSD and Jackie Thompson cross-appealed the District Court's denial of their Motion for Judgment as a Matter of Law on the retaliation issue on March 8, 1995 [CR-160].

D. The Request for Judicial Notice

During the appeals period, plaintiff Hopper became aware of a related case pending in the United States District Court for the Central District, which was filed around the same time as plaintiff Hopper's action and which was being handled on behalf of the Los Angeles Unified School District (the "District") by the same attorney who was handling Hopper's action, but which was

never brought to plaintiff's attention by the District throughout the course of the instant proceedings. That matter is captioned *Chanda Smith v. Los Angeles Unified School District, et al.*, U.S.D.C. No. CV-93-7044-LEW (Central District of California), and was filed as a class action lawsuit on behalf of Los Angeles Unified School District special education students in the fall of 1993.

Because the *Chanda Smith* action alleged massive District-wide non-compliance with special education mandates, the very same type of District-wide non-compliance about which Hopper was complaining, and because the District entered into a settlement of that action in which they admitted and agreed to a joint statement that there was system-wide non-compliance and misuse of funding, plaintiff Hopper requested that the Ninth Circuit take judicial notice of the Consent Decree and Consultant's Report filed in that action in order to rebut the District's arguments that the instances of non-compliance were 1) trivial, and 2) always corrected immediately. [App. 148-184]

While the same attorney in that case was admitting and agreeing on behalf of the District to everything contained in the Consultant's report, on the one hand, he was on the other hand denying the exact same factual allegations in the instant trial and appeal. Plainly this evidence should have been brought to the District Court's attention as a related case, and taken formal notice of by the Ninth Circuit, nonetheless the Ninth Circuit denied the Request for Judicial Notice on October 4, 1994 [App. 24], a decision plaintiff contends is in error.

V.

REASONS FOR GRANTING THE WRIT

A. Summary of Argument

The Ninth Circuit has rendered a ruling interpreting and applying the Federal False Claims Act in a manner that 1) conflicts substantially with the express language of the False Claims Act regarding the nature of the scienter requirement [*See, Motion by the United States, as represented by the Attorney General, to Amend Panel Opinion,* App. 139]; 2) conflicts substantially with its own decisions and with the decisions of other circuits regarding the scope and application of the False Claims Act and the nature of the false or fraudulent "claim" required; 3) conflicts with the terms and purpose of the IDEA; and 4) conflicts with the decisions of other circuits with respect to when the False Claims whistleblower protections attach to a complaining party.

Specifically, the conflicts of law created by the Ninth Circuit in rendering its opinion in this action are:

1) The standard of "knowing" fraud deemed to be actionable by the Ninth Circuit was erroneous as a matter of law and conflicts with the literal statutory language, because the False Claims Act includes in its definition of "knowing" or "knowingly" the "reckless disregard of the truth or falsity of the information", and "no proof of specific intent to defraud is required", 31 U.S.C. § 3729(b) [App. 45], whereas the Ninth Circuit held that the District's past regulatory non-compliance [namely, what is now eight straight years of District-wide non-compliance despite assurances to the contrary made yearly in order to continue to receive federal funding under the IDEA], had not risen to the level of "knowing fraud" [OPN. 9306; App. 18] because "for a certified statement to be 'false'

under the Act, *it must be an intentional, palpable, lie.*" [OPN. 9304; App. 16 (emphasis added)]

2) The Ninth Circuit's interpretation of the False Claims Act and its definition of a false or fraudulent "claim" is far too narrow, conflicting with both legislative history and the law of other circuits.

3) The Ninth Circuit's conclusion that the *Individuals with Disabilities Education Act* ("IDEA"), 20 U.S.C. § 1400 *et seq.* (1994) [App. 82] does not require certification of compliance with special education laws by a school district as a prerequisite to receipt of federal funding is contrary to the IDEA as a matter of law and policy, because in order to be eligible for funding under the IDEA, an applicant must not only submit an application assuring future compliance and the existence of procedures to ensure compliance, but must also actually *be* in compliance with all special education laws, and furthermore failure to comply with the special education laws is cause for withholding of federal funds under the IDEA. If this decision is allowed to stand, the integrity of the IDEA and the mechanisms for its enforcement will be seriously impaired.

4) The finding holding Hopper to the standard that while investigating non-compliance both she and her employer must have *known* at the time whether or not the conduct being investigating would ultimately be determined to be innocent or fraudulent, in order to receive protection from retaliation for the investigative activities, conflicts with decisions by other circuits interpreting both the False Claims Act and other statutes with similar anti-retaliation measures.

Under the Ninth Circuit's ruling, a potential false claims plaintiff receives protection from retaliation only if the investigatory conduct not only leads to the filing of an actual False Claims Action, but also results in an

action resolved in the plaintiff's favor with respect to the existence of actual fraud and/or the actual presentation of false "claims" as defined by the court in the particular case. This narrow interpretation of the whistleblower protection provision contradicts the decisions of other circuits.

B. The Court's Definition of Knowledge Required For A Finding Of Fraud Contradicts With The Explicit Definition Of "Knowing" Or "Knowingly" In The False Claims Act

For *all* types of false claims, whether direct fraud, promissory fraud, or consisting of a "reverse" false claim, the False Claims statute requires a "knowing" act. However, the False Claims Act explicitly states that "knowing" does *not* mean that specific intent to defraud is required, and instead defines "knowing" or "knowingly" as including "*reckless disregard* of the truth or falsity of the information". 31 U.S.C. § 3729(b).

Contrary to this explicit definition, the Ninth Circuit held that the District's past regulatory non-compliance and assurances of future compliance had not risen to the level of "knowing fraud" [OPN. 9306; App. 18] *because it was not an "intentional, palpable, lie."* [OPN. 9304; App. 16 (emphasis added)] This standard is *not* the same as the standard of mere reckless disregard required by the False Claims Act at § 2729(b), and constitutes an unacceptable raising of the scienter requirement for false claims which should not be allowed to remain as precedent for other circuits. Already the Ninth Circuit has cited its *Hopper v. Anton* decision for the scienter required, albeit in an unpublished decision, indicating that the scienter requirement established by the *Hopper* decision establishes precedent and was not merely incidental. *United States of*

America ex rel. Hill v. Teledyne, Inc., 1996 U.S. App. LEXIS 30178 (1996).

The Attorney General, on behalf of the United States, is in accord with plaintiff Hopper regarding the fact of this error, and filed a brief to that effect. [App. 139] However, the Attorney General asserts that a correct statement of the scienter requirement would not necessitate a different result, an assertion with which plaintiff disagrees. Aside from the fact that this is a necessary position for the Attorney General to take if they want to increase their chances of having the decision amended by the Ninth Circuit, in reality it is surely true that the correct scienter requirement *would* lead to a different conclusion with respect to the District's promissory fraud.

This is true because the submission of annual and tri-annual assurances and promises of compliance over the course of *eight years* (four years at the time of the summary judgment decision), the continued endorsement of checks, and the submission of annual reconciliation reports stating that no monies were owed back to the federal government, in the face of repeated and ongoing findings of non-compliance in the same specific areas, surely could constitute *reckless disregard* for the truth or falsity of the assurances, and thus satisfy the threshold standard in the face of a summary judgment motion to be actionable as a matter of law under the False Claims Act.

Thus, the Ninth Circuit's decision contradicts the literal language of the False Claims Act and should be reviewed in order to prevent the institution of a higher standard of scienter than that warranted by the legislature.

C. The Ninth Circuit's Reading Of The False Claims Act In This Case Is Overly Restrictive In Contravention Of The Legislative History And In Conflict With The Decisions Of This Court And Of Other Circuits, As Well As The Ninth Circuit's Own Earlier Decisions

The District Court dismissed the first cause of action for False Claims on Motion for Summary Judgment with the following reasoning:

> Plaintiff shows that there is substantial evidence that LAUSD has committed violations of the rules and regulations governing it . . . What she has not shown is that any particular false representation has been made to obtain federal money for the IDEA programs.
>
> . . .
>
> It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA. Plaintiff assumes that if Los Angeles Unified School District (LAUSD) has violated regulations or law governing the Individuals with Disabilities Education Act (IDEA), it is automatically subject to suit under FCA. The FCA is far narrower. It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e. with knowledge of the falsity and with intent to deceive) must exist. This does not mean that other types of violations or regulations, or contracts, or conditions set for the receipt of monies, or of other federal laws and regulations are not remediable; it merely means that such are not remediable

> under the FCA or the citizen's suit provisions contained therein.
>
> . . .
>
> There is ample evidence that LAUSD has violated IDEA requirement. However, plaintiff has not been able to point to any *certifications or other statements of fact* made to the CDOE or USDOE *which contain falsehoods.*

[CR-74; App. 27, 29] (emphasis added).

In affirming that decision, the Ninth Circuit quoted the same passage and further stated:

> . . . [T]he Act attaches liability, not to the underlying fraudulent activity, but to the "claim for payment" [citation omitted] What constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or simply false. [citation omitted] [App. 12]

Based on the legislative history of the False Claims Act and the decisions made by other circuits, however, petitioner Hopper maintains that this is a far too narrow reading of the False Claims Act, because it is precisely the fact of the existence of underlying fraudulent activity which does trigger the application of the False Claims Act, when that activity is intentionally or recklessly concealed or misrepresented in order to receive federal funds, regardless of whether a "paper claim" containing such an affirmative misrepresentation is made.

The Ninth Circuit turns the False Claims standard into a paper chase – if a physical document seeking payment of funds demonstrates the fraud on its face, then liability under the False Claims Act attaches, but if the funds are received without any affirmative misrepresentation, then it does not, regardless of the fact that the widgets being made do not actually comply with this, that or the other requirement necessary for the receipt of the funds. Obviously this is an absurd result, allowing the

District to escape liability under the False Claims Act on the technicality of having made mere "promises" of compliance is their demands for funds rather than actual "certifications" of *past* compliance.

If it is a requirement that the widgets being made for the federal government comply with, say, all federal safety standards, and they don't, but the manufacture accepts the federal funding anyway, there is an *implicit* fraudulent claim created when the manufacturer endorses the checks. The company would be accepting monies knowing that it really shouldn't, a specific type of fraud actionable under the False Claims Act. 31 U.S.C. § 3729; *United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1956).

This is exactly the situation in the instant action, where the District is required to comply with all special education laws as a condition to the continued receipt of federal funding.[3] As can now not be disputed by the District (due to the *Chanda Smith* decree[4]), because the

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[3] The deposition transcript of Dr. Phillip Callison, the Superintendent of Special Education during the relevant time period, makes it clear that at all relevant times he was fully aware that compliance with state and federal mandates was necessary for the district to lawfully receive IDEA money from the federal government: Q. "Am I correct in assuming that you understood that the receipt of that money [federal] was conditioned upon compliance with federal regulations?" A. "And State."; Q. "[W]hat money that the District received depended on complying with P-94-142?" A. "Well, all the money depended on from the state, federal government, and everybody, that we complied with the law." Q. "With what law?" A. "With all of the law." [CR-65, Exhibit B, p. 80)

[4] For the District to argue otherwise at this point would be to perpetuate its ongoing fraud on the courts, because in light of the District's agreement with the findings of the Consultant's Report, it can no longer argue in the instant action that the

District has been in pervasive, substantial non-compliance for many years there is implicit fraud in the District's providing annual and tri-annual assurances that they "would be" in compliance and yet continuing to endorse and deposit checks.

The Ninth Circuit's narrow reading of the "claim" requirement in this case is inconsistent with the growing body of law holding that the False Claims Act is to be very broadly construed, as set forth by this Court as well as by earlier panels of the Ninth Circuit:

> The debates in Congress when the original Act was passed suggest that *the Act was intended to reach **all types of fraud, without qualification,*** that might result in financial loss to the government. *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 1968 U.S. LEXIS 2911, 19 L.Ed.2d 1061 (1968) (emphasis added).
>
> . . .
>
> In refusing to read the statute narrowly, the Court stated: 'In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil. *Id.* at 232.

United States v. Jackson, 845 F.2d 880, 882, 1988 U.S. App. LEXIS 5913 (9th Cir. 1988); *see also, United States v. Cohn*, 270 U.S. 339, 345-346, 70 L.Ed. 616, 46 S.Ct. 251 (1926); *United States v. Bornstein*, 423 U.S. 303, 46 L.Ed.2d 514, 96 S.Ct. 523 (1976).

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instances of non-compliance are trivial and have always been immediately corrected, and that all monies received for special education are in fact used for that purpose.

Making the Ninth Circuit's present decision all the more confusing is the fact that the Ninth Circuit previously acknowledged that the mere cashing of checks issued by mistake, without an actual "demand" for the money having been made, was sufficient for action under the False Claims Act:

> We agree with the ruling and conclude in the instant case the district court correctly decided that McLeod, who endorsed and deposited three government checks, which he knew were issued by mistake, presented three false claims against the United states. *The fact that McLeod did not make an actual demand for money is irrelevant. McLeod's argument that he could not have violated the False Claims Act because he made no claims against property of the United States is unconvincing. . . . The government's financial loss caused by McLeod's fraud satisfies the provisions of the False Claims Act.*

United States v. McLeod, 721 F.2d 282, 284 (9th Cir. 1983) (emphasis added); *see also, United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1956); *United States ex rel. Hagood v. Sonoma County Water Authority*, 929 F.2d 1416 (9th Cir. 1991).

Yet now the Ninth Circuit is holding just the opposite – that the District may not be held liable under the False Claims Act because, although there were plainly actual demands for money made (unlike *McLeod*!), those demands on their face were not "fraudulent or simply false":

> In this instance, the School District did not make a *certification* which could constitute a "false claim" under the Act, much less a false statement which caused the United States to provide an improper benefit.
>
> . . .

> It is the false *certification* of compliance which created liability when certification is a prerequisite to obtaining a government benefit. [citations, both of which are to District Court decisions, are omitted].

[App. 13 (emphasis in original)]

However, this analysis disregards the avowed broad reach of the False Claims Act to reach all types of underlying fraud regardless of how the federal monies are caused to be received by the recipient, as long as the federal government is in fact paying out sums of money to recipients who know, or are in reckless disregard of the fact, that they are not actually entitled to the benefit of that money, because they have not satisfied the conditions for its receipt.

D. The Conclusion That The IDEA Does Not Require Certification Of Compliance With Special Education Laws As A Prerequisite To The Receipt Of Federal Funding Conflicts With The IDEA

As acknowledged by the Ninth Circuit, a promise which is false when made and which thus "creates eligibility that would otherwise not exist", *see*, John T. Boese, *Civil False Claims and Qui Tam Actions* 1-29 to 1-30 (1995) [OPN. 9302, 9304; App. 16, 13], *would* create liability under the False Claims Act (as long as it was an "intentional, palpable lie", according to the Ninth Circuit – *see*, section V.B., *supra*.)[5] *Id.* Also acknowledged by the Ninth

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[5] In its decision with respect to the non-existence of promissory fraud, the Ninth Circuit sets forth as "undisputed" various key facts with respect to the District's conduct and operation, which in reality have always been very much disputed by appellant and which should have formed the basis

Circuit is the fact that promises of compliance with special education laws *are* made by the District in its triennial "Certifications of Participation, Compatibility and Compliance Assurances", submitted to the California Department of Education[6], and it is further undisputed

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for denial of summary judgment. Specifically, the decision asserts that it is undisputed that the District had a "general policy to comply", that the District had a policy of curing items of non-compliance, that the District negotiated to resolve and did resolve the problems of non-compliance, and that the District's non-compliance was on par with that of similar Districts [OPN. 9305; App. 17]. It is these conclusions that lead the Court to conclude that the District's non-compliance despite promises to the contrary did not rise to the level of "knowing fraud".

In her "Statement of Genuine Issues In Opposition to Motion for Summary Judgment" [CR-64], however, *controverting* the District's "Statement of Undisputed Facts", as required by local Central District Rules, and later through her Request for Judicial Notice, denied by the Ninth Circuit, appellant Hopper *did* in fact specifically and repeatedly dispute the District's claims that it had a general policy to comply and to cure items of non-compliance, and produced ample evidence both at trial and thereafter that the District in fact did *not* have a general policy to comply where it cost the District money, and that "items of non-compliance" were absolutely *not* cured, even as late as 1995, when a new non-compliance report was issued.

Thus, it was a misapprehension of the facts of this case for the Ninth Circuit to assert and rely on facts in support of a grant of summary judgment where those facts were actually at the core of the dispute and should have defeated summary judgment. Thus, the Ninth Circuit should not have relied on *disputed* facts as having been undisputed, and to refuse judicial notice of a key development with regard to the District's misconduct, in taking the position that the District's conduct did not rise to the level of "knowing" promissory fraud.

[6] The Tri-Annual "Certification of Participation, Compatibility and Compliance Assurances" states that a) "the

that the District makes actual "demands" for funds in several different ways.[7]

Overlooked by that Court, however, is the fact that the IDEA itself also requires the submission of annual applications for funding providing "satisfactory assurances" in order to eligible for continued receipt of funding. 20 U.S.C. § 1414 [App. 113]. Under the IDEA, federal

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agency(ies) herein represented will meet all applicable requirements of state and federal laws and regulations . . . ", b) the special education plan "has been adopted by the appropriate local board and is the basis for the operation and administration of special education programs", and c) "each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of Regs. 300.500-300.514 of Subpart E (20 U.S.C. 1414(a)(7))", non-inclusive.

[7] To summarize, the LAUSD makes requests and obtains federal monies for special education in at least the following ways:

1) It authorizes the cashing of checks for its special education program, portions of which funds derive from the United States Government;

2) It submits a J-380 annually at the end of each school year. This form reconciles the District's predictions of what the enrollment in special education will be with what it actually was. Based on this submission, the District could either receive more money or acknowledge that it owed money back to the federal government. The form J-380 reconciles what monies the District received from the federal government and what it was entitled to, so that, in essence, by knowing that it had failed to comply in the past year but stating in the J-380 that they nonetheless do not owe any funds back to the government, they are submitting a document which "reduces their indebtedness", a false claim under the False Claims Act; and,

3) It submits tri-annual "Certification of Participation, Compatibility and Compliance Assurances".

funding would *not* be renewed if "satisfactory assurances" of compliance with special education mandates were not made on an annual basis, 20 U.S.C. § 1414 [App. 113, 163], and funding may undisputedly be withheld whenever non-compliance exists. [App. 163, 164]

Nonetheless, in holding that no actionable "claims" for funding were made by the District, the Ninth Circuit found that 1) the Certifications are not a prerequisite to receipt of funding, because they are made only every three years, and 2) that for a certified statement to be "false" for purposes of promissory fraud, "it must be an intentional, palpable lie [citation omitted]." [OPN. 9304; App. 16] Appellant respectfully contends that both of these conclusions are erroneous, ignore the annual "satisfactory assurances" requirement of the IDEA, and conflict with the terms and purpose of the IDEA.

First, as discussed, "satisfactory assurances" *are* a precondition of eligibility for funding under the IDEA. By definition, a false promise of compliance in the face of pervasive, ongoing non-compliance is not a "satisfactory assurance" of compliance under the IDEA, and thereby inherently "creates eligibility that would otherwise not exist". *Boese, supra.* If it were not for the "satisfactory assurances" made by the District, under the IDEA the funding would not be provided, therefore the assurances *are* the cause of the issuance of the funding, and compliance with the IDEA court reasonably be disputed to be a condition of continued receipt of federal funds. (*See, also* Fn. 3, *supra*) Thus, the real issue with respect to promissory fraud that should have been addressed by the Ninth Circuit is whether or not the assurances made to the government via *both* the annual and triennial statements could constitute actionable false promises.

The Ninth Circuit concluded that they do not; however, this conclusion is patently incorrect not only

because it contradicts the IDEA, but also because 1) it relies on what it claims are "undisputed facts", but which, in fact, were definitely *not* "undisputed" and were specifically controverted (*see*, footnote 4, *supra.*); 2) it applies a standard of "knowledge" equivalent to that of an "intentional, palpable lie", which contradicts the literal language of the False Claims Act (*see*, section V.B., *supra*); and 3) it institutes the requirement that "claim" containing a very narrow type of overt misrepresentation be made in order for False Claims liability to attach (*see*, section V.C., *supra*), all as discussed herein.

E. In Conflict With Legislative History And The Decisions Of Other Circuits, The Ninth Circuit Imposes A Chilling Burden Upon Whistleblowers For The Attachment Of Protection From Retaliation

In reversing the jury verdict that was in plaintiff Hopper's favor, the Ninth Circuit found that while Hopper may well have been retaliated against [OPN. 9309; App. 22], the verdict was not supportable as a matter of law because Hopper's actions could not, under the Ninth Circuit's reasoning, constitute investigation of possible fraud because the District's non-compliance was not actionable under the False Claims Act. *Id.* This result is reached strictly with the benefit of hindsight, rather than looking at the circumstances *at the time of Hopper's investigatory conduct*, when Hopper had no way of knowing whether or not the conduct being investigated would actually turn out to be fraudulent and actionable[8].

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[8] The Ninth Circuit states that Hopper was "not investigating fraud", but rather was merely investigating "noncompliance". [OPN. 9308-9309; App. 21] As with the standard for attachment of protection from retaliation under the

For the Ninth Circuit to so hold imposes upon the would-be whistleblower an impossible standard in order to receive protection against retaliation, namely that of *knowing* at the time of his or her investigation not only that the conduct being investigated is *actually* fraudulent, and not done with some innocent explanation, but also that the conduct being investigated will ultimately be actionable as a matter of law. Just because some legal barrier ultimately intercedes to prevent a whistleblower's action from going to trial should not be allowed to preclude protection from retaliation as a result of the whistleblower's lawful, good faith activities.

Making protection from retaliation dependent upon whether or not that wrongdoing could or would ultimately be actionable has been explicitly disavowed by at least one other circuit, *Neal v. Honeywell, Inc.*, 826 F.Supp 266 (N.D. Ill. 1993), aff'd 33 F.3d 860 (7th Cir. 1994), with which this Court's instant decision conflicts. Similarly, as

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False Claims Act, this conclusion is made only with the benefit of hindsight in light of the Ninth Circuit's decision. There is no explanation as to why noncompliance, in Hopper's eyes, did not actually constitute fraud, nor as to how, if noncompliance was not viewed by Hopper as fraudulent, the instant action came to be filed at all. The reasoning is simply illogical.

In reality, Hopper specifically wrote by hand in her January 21, 1990 Complaint to the Office of Civil Rights that *"the LAUSD receives federal and state funds for special education children. I believe that the school district is receiving monies for these two children and they are not being serviced."* [ER-5, p.24; CR-1] This comment alone belies the conclusion that *as a matter of law*, appellant Hopper was not and could not have reasonably been found to have been investigating potential fraud and/or false claims. It was established at trial, and the jury concluded, that Hopper was known to be investigating alleged wrongdoing and was retaliated against for that conduct, yet the Ninth Circuit reversed that verdict.

will be discussed, the Ninth Circuit's holding is contrary to scores of decisions concerning the attachment of protection from retaliation under various federal statutes.

By its terms, the statute creates a cause of action for an individual discriminated against for acts done "in furtherance of an action filed or to be filed" under the section and thus clearly extends to a plaintiff who brings a qui tam action pursuant to it. *See Coleson v. Inspector General of Department of Defense*, 721 F.Supp. 763, 765 (E.D. Va.1989). Section 3730(h) coverage, however, extends beyond a qui tam plaintiff to persons who initiate, investigate, testify or who are otherwise involved or assist in the preparation for and filing of a possible action, whether or not an action is actually ever filed. *Neal v. Honeywell, Inc.*, 826 F.Supp. 266, 269 (N.D. Ill.1993), aff'd 33 F.3d 860 (7th Cir. 1994).

> The legislative history of the FCA makes clear that:
> [t]he protected activity under this section includes any good faith exercise of an individual on behalf of himself or others of any option afforded by this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act. Consequently, the Committee believes protection should extend not only to actual qui tam litigants, but also to those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.

Sen. Rep. No. 345, 99th Cong., 2d Sess. 34, reprinted in, 1986 U.S.C.C.A.N. 5266, 5299.

In the *Honeywell* case, it was held that a plaintiff who alleges that she suffered harm after making an internal corporate complaint relative to fraud against the Government states a cause of action under 31 U.S.C. § 3730(h),

even if no lawsuit was ever filed by the plaintiff, the Government, or another qui tam informant. *Id.* at 270-72 (emphasis added), *cited in United States ex rel. Kent v. Aiello*, 836 F.Supp. 720 (E.D. Cal. 1993). *See also, Pogue v. United States Department of Labor*, 940 F.2d 1287 (9th Cir. 1991) (strictly internal whistleblower protected under provisions of four environmental whistleblower statutes).

The whistleblower protections envisioned by the drafters of the False Claims Act were modeled after those protections found in Federal safety and environmental statutes, including the Federal Surface Mining Act, 30 U.S.C. § 1293, Energy Reorganization Act, 42 U.S.C. § 5851, Clean Air Act, 42 U.S.C. § 7622, Safe Drinking Water Act, 42 U.S.C. § 300j-9, Solid Waste Disposal Act, 42 U.S.C. § 6971, Water Pollution Control Act, 33 U.S.C. § 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610, and Toxic Substances Control Act, 15 U.S.C. § 2622. *See*, Sen. Rep. No. 345, 99th Cong., 2d Sess. 34, reprinted in, 1986 U.S.C.C.A.N. §§ 5266, 5299.

As a general rule, whistleblower protection statutes are remedial in nature and thus are very broadly construed. Many courts have addressed issues similar to the one in the instant action under different federal whistleblower protection statutes. Almost without exception, they have held that the coverage of the statute at issue should be broadly construed so as to include internal whistleblowing, even where the conduct involved did not come under the literal terms of the statute.

In *NLRB v. Scrivener*, 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972), the Supreme Court held for reasons of public policy that language in the National Labor Relations Act extended whistleblower protection to an

employee who obviously did not meet the literal requirements of the statute. While the statute expressly covered an employee who "has filed charges or given testimony," the Court extended protection to an employee who had given a statement to a NLRB examiner but had neither filed charges nor testified at a formal hearing. *See also NLRB v. Retail Store Employees Union*, 570 F.2d 586, 590 (6th Cir. 1978) (following *Scrivener*), *cert. denied*, 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed.2d 109 (1978).

Similarly, in *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474 (3d Cir. 1993), the Third Circuit upheld the Secretary of Labor's construction of the whistleblower protection clause in the Clean Water Act to cover internal whistleblowers. The language at issue in *Passaic* was similar to the language of the False Claims Act. It protected any employee who "has filed, instituted, or caused to be filed or instituted any proceeding under this chapter." Water Pollution Control Act, 33 U.S.C. § 1367. The Secretary of Labor held that the language protected an employee who had made only internal complaints to his superiors, and the Third Circuit agreed.

In addition to *Scrivener* and *Passaic*, the federal courts have been nearly unanimous in holding that whistleblower protection is available under various statutes even to employees who are discriminated against after merely making their concerns known internally: *See, Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991) (internal safety complaints are protected by pre-amendment Energy Reorganization Act, 42 U.S.C. § 5851(a), which by its literal covered employees who "commenced . . . a proceeding under this chapter."); *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1989 (9th Cir. 1991);

Rayner v. Smirl, 873 F.2d 60, 63-64 (4th Cir. 1989) (Federal Railroad Safety Act, 45 U.S.C. § 441(a), which literally covers employees who "filed any complaint or instituted . . . any proceeding under or related to the enforcement of the Federal Railroad safety laws" also covers purely internal complaints), *cert. denied*, 493 U.S. 876, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1510-11 (10th Cir. 1985) (Energy Reorganization Act), *cert. denied*, 478 U.S. 1011, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162-63 (9th Cir. 1984) (Energy Reorganization Act); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (although a literal reading of the Mine Safety Act requires an employee to file charges or give testimony, such a narrow construction frustrates remedial purpose of the Act); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (assuming without discussion that the Energy Reorganization Act covers internal whistleblowers); *Baker v. Interior Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978) (The Mine Safety Act, 30 U.S.C. § 820(b)(1), which by its literal terms protects employees who "filed, instituted, or caused to be filed or instituted any proceeding under this chapter.", also protects purely internal complaints); *Phillips v. Interior Bd. of Mine Operators Appeals*, 500 F.2d 772, 781-83 (D.C. Cir. 1974) (Mine Safety Act construed to cover miners who complain but do not initiate formal proceedings), *cert. denied sub nom., Kentucky Carbon Corp. v. Interior Board of Mine Operations Appeals*, 420 U.S. 938, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975).

In each of these cases, internal whistleblowers who did not fall within the literal terms of the statute were

given protection in order to further the remedial purposes of the statutes involved. In the matter at hand, Plaintiff Hopper did timely file a False Claims Act suit after the retaliation and within the statute of limitations, however her suit was ultimately rejected on the grounds that "as a matter of law" the District could not be held liable under the False Claims Act.

Despite the fact that Hopper alleged retaliation for internal and external whistleblowing, and of course utilized the information she had used in her administrative complaints, to bring the instant False Claims action, and specifically raised the funding issue in her complaints (*see*, Footnote 8, *supra.*), and a jury found that Hopper had been retaliated against as a result of her investigatory conduct, the Ninth Circuit reversed the verdict because "in fact", based on its own decision, the District's conduct was not actionable as fraud and consequently Hopper "could not" have been investigating fraud.

This holding, which flies in the face of every other similar whistleblower protection provision, is frightening. For a whistleblower protection provision to have any real teeth at all, it must extend its coverage to those employees who in good faith risk their livelihood to blow the whistle on an employer they legitimately and in good faith believe is guilty of conduct which may be fraudulent and which may constitute actionable false claims, regardless of the actual outcome of any later filed false claims action.

Clearly if internal whistleblowers who do not later file federal complaints or actions under the relevant statutes are generally deemed to be protected as a matter of public policy, whistleblowers who, as in Plaintiff Hopper's case, *do* later file the appropriate federal statutory

action, regardless of the ultimate outcome of that portion of the action, should likewise be protected. To hold otherwise is to impermissibly chill the lawful, non-frivolous investigatory conduct which, as a matter of public policy, is encouraged by the False Claims Act.

VI.

CONCLUSION

Regardless of the political popularity or unpopularity of the decision to do so, the District's insistence on unabashedly flaunting federal law by their failure to implement and enforce effective procedures to ensure compliance with special education laws should be subject to liability under the False Claims Act, because the District's continued receipt of federal funds despite their failure to comply with the conditions for receipt of such funds constitutes a fraud on the federal government which results in the District obtaining a benefit to which it is not entitled. It would not make sense otherwise. If school districts and states could pick and choose which of the requirements they wish to abide by, the entire federal system regulating federal funding of state and local programs would fall into disarray.

As is frequently the case, the power of the purse string is the only effective and genuine enforcement mechanism the federal government has at its disposal to ensure state compliance with federal laws. It simply would not make sense for the federal government to *not* demand compliance with federal law, and to *not* allow a remedy which punishes repeated and belligerent noncompliance with the greatest of all motivators, money. The threat of liability under the False Claims Act accomplishes just that.

Yet the Ninth Circuit, in conflict with decisions of other circuits, has rejected the District's potential liability under the False Claims Act, unnecessarily and arbitrarily narrowing the scope of the False Claims Act, by altering the established "claim" requirement so that actual demands for funds made despite knowledge of or reckless disregard for the fact of failure to comply with conditions for the receipt of those funds, the endorsement of checks, and the providing of "satisfactory assurances", are held to be not technically sufficient to constitute "claims" for monies under the False Claims Act.

In addition, the Ninth Circuit, contrary to the literal terms of the False Claims Act, has unacceptably narrowed the scienter requirement in order to absolve the District of any potential liability, and has furthermore ignored the literal language of the IDEA as well as its purpose, which requires *satisfactory* assurances of compliance with all special education laws and regulations, a requirement which cannot possibly be met by years of substantial, pervasive non-compliance despite promises to the contrary.

Finally, the Ninth Circuit, in reversing the jury's special verdict in favor of petitioner Hopper on the grounds that since the District was found by the court to have not committed actionable fraud for purposes of the False Claims Act, Hopper "could not" have been investigating fraud, has contradicted the law established by scores of other decisions which have interpreted the whistleblower protection provisions found in the False Claims Act and other citizen enforcement statutes much more broadly as a matter of public policy.

Thus, the Ninth Circuit has rendered a ruling interpreting and applying the Federal False Claims Act in a manner that 1) conflicts substantially with the express language of the False Claims Act regarding the nature of

the scienter requirement; 2) conflicts substantially with its own decisions and with the decisions of other circuits, as well as the legislative history of the False Claims Act, by narrowing the scope and application of the False Claims Act and the nature of the false or fraudulent "claim" required; 3) conflicts with the terms and purpose of the IDEA; and 4) conflicts with the decisions of other circuits with respect to when the False Claims Act whistleblower protections may attach to a complaining party.

Therefore, based on all of the foregoing, petitioner respectfully prays that certiorari be granted.

DATED: December 12, 1996

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APPENDIX

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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* * * Costs Taxed * * *

(Filed Sept. 23, 1996
MANDATE ISSUED)

NO. 95-55273
CT/AG#: CV-93-02441-HLH

UNITED STATES OF AMERICA Ex Rel.
SHEILA HOPPER,

Plaintiff - Appellant

v.

WILLIAM ANTON; LOS ANGELES
UNIFIED SCHOOL DISTRICT;
LEONARD BRITTON; PAUL CARR;
PHILLIP CALLISON; JAMES ESTERLE;
DEANNE NEIMAN; BENITA CHAUM;
CAROL ALBRIGHT; JACKIE THOMPSON

Defendants - Appellees

NO. 95-55374
CT/AG#: CV-93-02441-HLH

UNITED STATES OF AMERICA Ex Rel.
SHEILA HOPPER,

Plaintiff - Appellee

v.

WILLIAM ANTON; LEONARD BRITTON;
PAUL CARR; PHILLIP CALLISON;

JAMES ESTERLE; DEANNE NEIMAN;
BENITA CHAUM; CAROL ALBRIGHT

Defendants

and

JACKIE THOMPSON; LOS ANGELES
UNIFIED SCHOOL DISTRICT

Defendants - Appellants

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART.

Filed and entered July 31, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel., SHEILA HOPPER, *Plaintiff-Appellant,* v. WILLIAM ANTON; LOS ANGELES UNIFIED SCHOOL DISTRICT; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE; DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT; JACKIE THOMPSON, *Defendants-Appellees.*	No. 95-55273 D.C. No. CV-93-02441-HLH
UNITED STATES OF AMERICA ex rel., SHEILA HOPPER, *Plaintiff-Appellee,* v. WILLIAM ANTON; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE; DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT, *Defendants,* and JACKIE THOMPSON; LOS ANGELES UNIFIED SCHOOL DISTRICT, *Defendants-Appellants.*	No. 95-55374 D.C. No. CV-93-02441-HLH OPINION

Appeals from the United States District Court for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
June 3, 1996 – Pasadena, California

Filed July 31, 1996

Before: Jerome Farris, Ferdinand F. Fernandez and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

James H. Fosbinder, and Rhonda M. Fosbinder, Fosbinder & Fosbinder, Venice, California, for the plaintiff-appellant.

Bonifacio B. Garcia and Alex M. Moisa, Barbosa, Garcia & Barnes, Los Angeles, California, for the defendants-appellees.

OPINION

THOMAS, Circuit Judge:

Sheila Hopper ("Hopper") appeals from the district court's entry of summary judgment against her *qui tam* False Claims Act ("FCA" or "Act") claim against the Los Angeles Unified School District ("LAUSD" or "School District"). The School District cross-appeals the district court's refusal to enter judgment as a matter of law after trial on Hopper's FCA employment retaliation claim under 31 U.S.C. § 3730(h).

We **AFFIRM** the grant of summary judgment and **REVERSE** the denial of the School District's motion for judgment as a matter of law after trial.

I. BACKGROUND

Hopper has been employed by the School District as a special education teacher for more than 20 years. Beginning in April of 1989, Hopper began complaining to her superiors that the School District was failing to comply with federal and state laws regarding the handling of special education children. Specifically, she alleged that the School District conducted Individualized Education Program ("IEP") evaluations[1] of potential special education students with special education teachers rather than the students' classroom teachers. She contended this procedure violated California Education Code § 56341(b)(2)[2] and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (1994).[3]

Finding her superiors unrepentant, she reported the matter to the California State Department of Education

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[1] An IEP evaluation is a meeting to develop, review, or revise the individualized education program of an individual student with special needs. Cal. Educ. Code § 56341(a) (West 1989); 20 U.S.C. § 1401(a) (1994).

[2] The Code requires the student's classroom teacher to be present at the IEP meeting. Cal. Educ. Code § 56341(b)(2) (West 1989). However, if that teacher is unavailable, a special education teacher qualified to teach the student may substitute. *Id.*

[3] Hopper also alleged violations of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), and 34 C.F.R. § 100 *et seq.* (1994), the regulations implementing the IDEA.

("CDOE") on May 15, 1989. The CDOE issued a compliance report on July 14, 1989 agreeing with Hopper that the School District was failing to comply with the California Education Code. When the School District continued to exclude classroom teachers from IEP evaluations,[4] Hopper renewed her complaint to the CDOE in December 1989 and January 1990. On February 16, 1990, the CDOE again found the School District out of compliance with § 56341.[5] The CDOE warned that continued failure to comply could result in a recovery of state funds from or a curtailment of state funds to the School District. The CDOE and the School District engaged in negotiations over the course of the next two years to solve the problem. During this period, Hopper continued reporting to the CDOE that classroom teachers were not permitted to attend IEP evaluations, filing complaints in November 1990 and February 1991. On January 14, 1992, the CDOE again found the School District out of compliance.

Hopper filed a discrimination complaint with the U.S. Department of Education Office for Civil Rights on

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[4] LAUSD considered its classroom teachers "unavailable" for IEP evaluations and continued to substitute special education teachers for classroom teachers at the evaluations, believing this to be permissible under the law.

[5] The CDOE interpreted § 56341(b)(2) to require classroom teachers to be present at IEP evaluations unless they are unavailable due to illness or other problem. That section does not permit a school district as a matter of policy to consider its classroom teachers "unavailable," allowing routine substitution of special education teachers for classroom teachers at IEP evaluations, as LAUSD had believed.

January 21, 1990, contending that special education students were not being serviced. On June 15, 1990, the agency found that the School District was in violation of federal law because of its delay in placing students eligible for special education into qualified programs. It also found that the School District had not harassed or retaliated against Hopper because of her complaints of LAUSD's noncompliance, as Hopper had alleged.

In March of 1990, a parent of one of Hopper's students complained to Jackie Thompson, principal of Nestle Elementary School, that Hopper had pushed and hurt his son. Thompson notified the police, as she is required to do under California Penal Code § 11166. The police determined that no crime had been committed. However, based in part on reports by Hopper's teaching assistant Olivia Ruiz and other students, Thompson concluded that Hopper had used impermissible corporal punishment in her classroom.

At approximately the same time, Thompson learned that a student was coming late to school on a regular basis without Thompson's knowledge or permission. The student's mother had met with the classroom teacher and Hopper. The three agreed it would be in the student's best interest for the student to come to school late. The mother felt she had received permission to bring her son late to school, and she began to do so.

Hopper contended she did not give the parent such permission. Thompson held Hopper and the classroom teacher responsible and recommended that both teachers be given written reprimands. The charges against Hopper included permitting a student to arrive late to school

without proper authority and using improper corporal punishment inside and outside her classroom. Thompson's superiors felt more severe discipline was warranted and decided to suspend Hopper for 15 days.[6]

Hopper filed her first amended complaint in the district court on October 15, 1993, asserting two causes of action: one under the *qui tam* provisions of the FCA and another under § 3730(h) of the FCA for retaliation in employment for FCA-protected activity. For her *qui tam* action, Hopper alleged that the School District conducted evaluations of potential special education students without classroom teachers in violation of California Education Code § 56341(b)(2) and 34 C.F.R. § 300.344(a) and prolonged the evaluation process to avoid placing eligible students into special education classes in violation of state and federal law. Hopper argued these violations of state and federal law entitled her to bring a *qui tam* action under the FCA for recovery of IDEA funds provided to the School District. For her claim under § 3730(h), Hopper alleged LAUSD, Thompson, and others retaliated against her in several ways, including filing false child abuse charges against her, suspending her for 15 days, encouraging the filing of false assault charges against her by her assistant, failing to transfer her to an opening as full-time teacher at one school and maintaining her in two part-time positions at two schools.

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[6] Hopper never served the suspension. The teacher's union took the matter to arbitration on Hopper's behalf, and the arbitrator held that LAUSD had failed to prove any of the charges.

The parties jointly moved for a continuance to permit additional discovery, but the district court denied the motion. LAUSD then moved for summary judgment on both causes of action. Hopper argued for additional discovery before a ruling on the motion. The district court refused the request and granted the School District's motion for summary judgment on Hopper's *qui tam* action, holding that a violation of law or regulations without a false statement is not sufficient to support a cause of action under the FCA. The court denied summary judgment as to the § 3730(h) retaliation claim.

A jury trial ensued, resulting in a special verdict that Thompson had retaliated against Hopper for FCA-protected activity but that all other defendants were innocent of any wrongdoing. The School District moved for judgment as a matter of law after trial on the § 3730(h) claim, arguing that no reasonable jury could conclude that Thompson retaliated against Hopper or that Hopper was engaged in FCA protected activity. The district court denied the motion. Hopper timely appealed the order granting summary judgment against her *qui tam* action, and LAUSD timely cross-appealed the district court's refusal to enter judgment as a matter of law on the § 3730(h) claim. Hopper also contends on appeal that the district court erred in refusing to permit her additional discovery before ruling on the summary judgment motion.

II. SUMMARY JUDGMENT ON THE FALSE CLAIMS ACT CLAIM

A. OVERVIEW

We review a district court's grant of summary judgment *de novo*. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). We must "determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court [properly] applied the law." *Id.*

Hopper contends that the School District submitted false claims actionable under the FCA by (1) annually submitting reports to CDOE reconciling actual enrollment with the School District's predicted enrollment; (2) cashing checks received from CDOE for special education, a portion of which was derived from federal funding; and (3) submitting a triennial certificate to CDOE certifying that LAUSD "will meet all applicable requirements of state and federal law and regulations," including "general compliance" with the IDEA.

B. CLAIM OF REGULATORY VIOLATIONS

Hopper's first two contentions originate from her assertion that LAUSD's regulatory violations create a viable cause of action under the FCA. Hopper contends that the School District committed actionable fraud against the government by annually submitting "J-50" and "J-380" forms to the CDOE indicating the number of special education students in the district. Hopper argues

that because the School District was not in regulatory compliance, submission of these forms constitutes an actionable false claim. She also contends that by cashing checks received from CDOE, LAUSD was committing actionable fraud because the School District was not in compliance with IDEA regulations.

In granting summary judgment, the district court found that Hopper had not met the FCA's scienter and false claim requirements, stating:

> It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA. Plaintiff assumes that if Los Angeles Unified School District (LAUSD) has violated regulations or law governing the Individuals with Disabilities Education Act (IDEA), it is automatically subject to suit under FCA. The FCA is far narrower. It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e., with knowledge of the falsity and with intent to deceive) must exist. This does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys, or of other federal laws and regulations are not remediable; it merely means that such are not remediable under the FCA or the citizen's suit provisions contained therein.

We agree with the district court's analysis of plaintiff's claims. The FCA was enacted during the Civil War

with the purpose of forfending widespread fraud by government contractors who were submitting inflated invoices and shipping faulty goods to the government. *U.S. v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). In furthering this goal, the Act attaches liability, not to underlying fraudulent activity, but to the "claim for payment." *Id.* What constitutes the FCA offense is the knowing presentation of a claim that is either fraudulent or simply false. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

The archetypal *qui tam*[7] FCA action is filed by an insider at a private company who discovers his employer has overcharged under a government contract. *See, e.g., United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3853-54 (U.S. June 24, 1996) (No. 95-1730). However, FCA actions have also been sustained under theories of supplying substandard products or services (*see, e.g., United States v. Aerodex*, 469 F.2d 1003 (5th Cir. 1972)); false negotiation, including bid

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[7] Under the FCA, a private individual is empowered to bring an action on behalf of the U.S. government (termed a "*qui tam*" action) against any individual or company who has knowingly presented such a false or fraudulent claim to the U.S. government. *United States ex rel. Anderson v. Northern Telecom*, 52 F.3d 810, 812-13 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 700, 133 L. Ed. 2d 657 (1996). If the plaintiff succeeds in her *qui tam* suit, she shares the judgment with the government as a bounty. 31 U.S.C. § 3730(d) (1994). The purpose of the *qui tam* provisions of the FCA is to encourage private individuals who are aware of fraud being perpetrated against the government to disclose that information. *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 742 (9th Cir. 1995) (en banc), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1877, ___ L. Ed. 2d ___ (1996).

rigging and defective pricing (*see, e.g., United States v. Ehrlich*, 643 F.2d 634 (9th Cir.), *cert. denied*, 454 U.S. 940, 102 S. Ct. 474, 70 L. Ed. 2d 247 (1981)); and false certification (*see, e.g., United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977)). Hopper claims FCA liability as a result of false certification of compliance with federal law.

John T. Boese explained the theory of false certification in his text on the False Claims Act:

> False certification cases differ from mischarging and false negotiation cases. In these cases, parties avail themselves of benefits of some type, such as loan guarantees or agricultural supports, through false statements which create eligibility that otherwise would not exist. Two major questions relating to liability in these cases are: (1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's loss.

John T. Boese, *Civil False Claims and Qui Tam Actions* 1-29 to 1-30 (1995).

In this instance, the School District did not make a certification which could constitute a "false claim" under the Act, much less a false statement which caused the United States to provide an improper benefit. A brief review of the federal government's mechanism for funding special education illustrates this. Each year, the federal government allocates IDEA funds to California and other states for special education programs to ensure a free appropriate public education for children with disabilities. 20 U.S.C. § 1400(c) (1994). Federal money for

special education is assigned to the states on a per-student basis. 20 U.S.C. § 1411(a) (1994). However, California apportions the money among its school districts based upon other information, including the number of special education personnel and other factors, rather than on solely a per-student basis. This information is listed in the J-50 form every district must submit to the CDOE four times a year. At the end of the year, each district submits to the CDOE a form J-380 either to request reimbursement for money spent in excess of budget or to pay back excess money received to which it is not entitled.

As the district court observed, Hopper misinterprets the breadth of the Act. Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit. *See United States ex rel. Fallon v. Accudyne Corp.*, 880 F. Supp. 636, 638 (W.D. Wis. 1995) (false certification of compliance with environmental laws states FCA claim); *X Corp. v. Doe*, 816 F. Supp. 1086, 1093 (E.D. Va. 1993) ("The heart of fraud is an intentional misrepresentation. A violation of a regulatory provision, in the absence of a knowingly false or misleading representation, does not amount to fraud."). In the J-50 and J-380 forms, the School District made no such false certification. The forms do not contain any certification concerning regulatory compliance. In fact, the IDEA does not require funding recipients to certify their compliance with federal laws and regulations.

Hopper also argues that the School District has made an actionable false claim by accepting federal funds when it was not in compliance with IDEA. This contention

suffers from the same fatal defect: lack of a false claim. Mere regulatory violations do not give rise to a viable FCA action. This is particularly true here where regulatory compliance was not a *sine qua non* of receipt of state funding. There are administrative and other remedies for regulatory violations. Hopper knows this. She has pursued many of them. However, absent actionable false certifications upon which funding is conditioned, the False Claims Act does not provide such a remedy.

C. CLAIM OF PROMISSORY FRAUD

Hopper next argues that the School District's submission of a triennial certification, containing general assurances that the School District will generally comply with applicable federal law, is an actionable false certification under the Act. Every three years, each California school district must prepare a "Local Plan" to submit to the CDOE. The Local Plan is an agreement between the school district and the district's community detailing how the district is going to implement its special education programs. This Local Plan includes the Certification of Participation, Compatibility, and Compliance Assurances ("Certification of Assurances"), which the district superintendent signs to indicate that a district will operate its special education programs in a manner consistent with both state and federal law. The affected school district certifies:

> that the agency(ies) herein represented will meet all applicable requirements of state and federal laws and regulations, including general compliance with Public Law 94-142, Section 504

> of Public Law 93-112 and the provisions of the California Education Code, Part 30.

Every three years, the CDOE conducts a comprehensive review of school districts' special education programs and outlines problem areas. If the review reveals areas of noncompliance with law or regulation, a school district must propose a solution to the problem acceptable to the CDOE.

However, this Certification of Assurances is *not* a prerequisite for the School District to receive annual IDEA funds. This is partly because IDEA funding has been assigned to California before the state has apportioned the funding among its districts. Thus, even if false, the LASUD [sic] certificate fails the test of being "the cause of the Government's providing the benefit." *See* Boese at 1-29.

In addition, although promissory fraud may be actionable in rare circumstances under the FCA, the promise must be false when made. *See U.S. v. Shah*, 44 F.3d 285, 290 (5th Cir. 1995) (holding a promise of nondisclosure made after the defendant had made a specific promise to another party to disclose the information was actionable). For a certified statement to be "false" under the Act, it must be an intentional, palpable lie. *Hagood*, 81 F.3d at 1478. Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act. *Id.* "For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *United States ex rel. Anderson v. Northern Telecom,*

52 F.3d 810, 815 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 700, 133 L. Ed. 2d 657 (1996).

Here, the record is devoid of any such showing. In fact, the undisputed evidence leads to the opposite conclusion concerning the School District's intent to be in "general compliance" with applicable laws. LAUSD is one of the largest public school districts in the United States, serving nearly 640,000 students on a $4 billion annual budget. It has one of the largest special education programs in the country, providing services beyond those required by law. While the School District receives a significant amount of funding from the federal government for special education programs under the IDEA, it spends routinely between 15 and 20 times this amount on special education programs.[8] The School District spends 100% of its IDEA funding on special education programs and services as provided under 20 U.S.C. § 1411(c). To meet state and federal requirements, LAUSD must also take money from the fund intended for general education for all students. This is called "encroachment," and the amount of encroachment typically falls between $160-180 million annually, or roughly 32-36% of the approximate $500 million total budget for special education. With 64,000 students eligible for special education, LAUSD receives 15 complaints of noncompliance every year. This

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[8] For example, in fiscal year 1989-90, when Hopper first accused LAUSD of failing to comply with federal and state law, LAUSD spent $473,117,934 on special education, of which $22,054,788 came from federal funding under the IDEA. In fiscal year 1990-91, LAUSD spent $511,039,298 on special education, of which $22,689,953 came from federal funding under the IDEA.

number is consistent with the number of complaints submitted against other California school districts.

The undisputed facts show that it is the School District's general policy to comply with all applicable state and federal laws and regulations and that it has an elaborate administrative structure to do so. The CDOE also monitors LAUSD's compliance with state and federal special education laws. The School District has a policy of curing items of noncompliance with laws or regulations when noted by the CDOE. When the CDOE on February 16, 1990 found the School District out of compliance by excluding classroom teachers from IEP meetings, the CDOE and the School District negotiated over the course of the next two years to solve the problem.

Hopper argues that past regulatory noncompliance creates an inference that the School District lied when certifying future compliance. This is not sufficient evidence to establish knowing fraud under the Act.

D. DENIAL OF DISCOVERY

A district court's refusal to permit additional discovery is reviewed for an abuse of discretion. *Qualls v. Blue Cross*, 22 F.3d 839, 844 (9th Cir. 1994). We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities and can show how allowing additional discovery would have precluded summary judgment. *Id.* The new material Hopper discovered after the district court granted summary judgment against her was nothing more than additional proof of the School District's continuing failure to comply with federal regulations. Thus, the additional

material demonstrating the School District's continued noncompliance would not have prevented the entry of summary judgment against Hopper. Coupled with the fact that Hopper had eighteen months prior to the hearing to conduct discovery, this leads to the conclusion that the district court did not abuse its discretion in denying additional discovery.

III. THE SCHOOL DISTRICT'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

This court reviews a district court's refusal to grant judgment as a matter of law after trial *de novo. Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 501 (9th Cir. 1996). The district court's refusal must be affirmed if there is substantial evidence to support the verdict. *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994). Substantial evidence is evidence reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence. *Id.*

The facts central to the School District's motion are essentially uncontroverted. The paramount issue is whether Hopper has proven a claim of retaliation under 31 U.S.C. § 3730(h) (1994) as a matter of law. The School District contends that (1) Hopper was not investigating fraud and is therefore not covered by § 3730(h); (2) it could not have known Hopper was investigating fraud as required under the Act; and (3) it did not retaliate against Hopper because of her complaints. We find merit in the School District's first two arguments. We need not reach the last issue.

Congress added 31 U.S.C. § 3730(h) to the FCA in 1986 to protect "whistleblowers," those who come forward with evidence their employer is defrauding the government, from retaliation by their employer. S. Rep. No. 345, 99th Cong., 2d Sess. 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. Section 3730(h) provides in relevant part as follows:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h). Examining the text of the statute, there are three elements the plaintiff must prove in any § 3730(h) claim: 1) the employee must have been engaging in conduct protected under the Act; 2) the employer must have known that the employee was engaging in such conduct; and 3) the employer must have discriminated against the employee because of her protected conduct. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 34-35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299-300; *Mikes v. Strauss*, 889 F. Supp. 746, 752 (S.D.N.Y. 1995).

In this case, Hopper was not engaged in activity protected under the Act. Judgment should have been granted against her as a matter of law. Section 3730(h) only protects employees who have acted "in furtherance of an action" under the FCA. Specific awareness of the

FCA is not required. However, the plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action. *Neal v. Honeywell Inc.*, 33 F.3d 860, 864 (7th Cir. 1994). *See also Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 950-52 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1110, 130 L. Ed. 2d 1075 (1995) (holding that a plaintiff must be investigating fraud in order to bring a FCA suit to be protected under § 3730(h)).

The entire record fails to demonstrate Hopper was engaged in "furtherance of an action" under the FCA. Rather, the record quite clearly shows Hopper was merely attempting to get the School District to comply with Federal and State regulations. Her numerous written complaints, seventy letters and over fifty telephone calls were all directed toward this end. She was not trying to recover money for the government; she was attempting to get classroom teachers into IEP evaluation sessions. She was not investigating fraud. She was not whistleblowing as envisioned in the paradigm *qui tam* FCA action. *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 742 (9th Cir. 1995) (en banc), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1877, ___ L. Ed. 2d ___ (1996). Quite plainly, the thrust of her complaints was that the School District was failing to meet its IDEA obligations to its students. Correcting regulatory problems may be a laudable goal, but one not actionable under the FCA in the absence of actual fraudulent conduct. Her FCA allegations were not sufficient to pass summary judgment muster. Her investigatory activity did not have any nexus to the FCA. Thus, the district court should have granted the School District's motion for judgment as a matter of law.

Further, unless the employer is aware that the employee is investigating fraud, the employer could not possess the retaliatory intent necessary to establish a violation of § 3730(h). *Robertson*, 32 F.3d at 952. The legislative history clearly provides that a "whistleblower must show the employer had knowledge the employee engaged in 'protected activity.' " S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300.

The only party which the jury found guilty of retaliation was Thompson, an individual defendant. Here the parties heatedly argue about whether Thompson had knowledge of Hopper's complaints to the CDOE. Even if Thompson were intimately familiar with Hopper's complaints, Hopper never gave any indication she was investigating the School District for defrauding the federal government. Thompson may have engaged in retaliation for Hopper's activities, but the record does not show any connection to the FCA. The district court should have granted judgment as a matter of law.

IV. CONCLUSION

The district court did not err in granting LAUSD's motion for summary judgment on Hopper's *qui tam* action because a violation of a law or regulation standing alone is not proof of a false claim. The district court did not abuse its discretion in refusing additional discovery, because that additional discovery would not have precluded summary judgment. However, the district court erred in refusing to grant LAUSD's motion for judgment as a matter of law because there was no substantial

evidence that Hopper was engaged in protected activity or that LAUSD had notice Hopper was engaging in protected activity.

AFFIRMED IN PART, REVERSED IN PART.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Ex Rel. SHEILA HOPPER, Plaintiff-Appellant, v. WILLIAM ANTON; LOS ANGELES UNIFIED SCHOOL DISTRICT; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE; DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT; JACKIE THOMPSON, Defendants-Appellees.	No. 95-55273 D.C. No. CV-93-02441-HLH
UNITED STATES OF AMERICA Ex Rel. SHEILA HOPPER, Plaintiff-Appellee, v. WILLIAM ANTON; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE; DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT, Defendants. and	No. 95-55374 D.C. No. CV-93-02441-HLH ORDER (Filed May 31, 1996)

JACKIE THOMPSON; LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendants-Appellants.

The Los Angeles Unified School District's motion to strike certain excerpts of record is GRANTED.

Hopper's motion for the Court to take judicial notice is DENIED.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By: /s/ Estela Urrutia
Estela Urrutia
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 93-2441 HLH **Date** October 3, 1994

Title U.S.A. ex rel, Sheila Hopper v. Los Angeles Unified School District, et al.

DOCKET ENTRY

(Filed Oct. 4, 1994)

PRESENT:

HON. HARRY L. HUPP, JUDGE

Milli Borgarding	/s/ C. Ciszowski
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
James Fosbinder✔	Howard Friedman✔
	B.B. Garcia✔

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ORDER (also if applicable, findings and memorandum opinion):

The motion for summary judgment as to the first claim (violation of the False Claims Act (FCA)) is granted and said claim is dismissed. The motion for summary judgment as to the second claim ("whistleblower" claim

for retaliation) is denied. This minute order is the court's determination; no more formal order is necessary.

It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA. Plaintiff assumes that if Los Angeles Unified School District (LAUSD) has violated regulations or law governing the Individuals with Disabilities Education Act (IDEA), it is automatically subject to suit under FCA. The FCA is far narrower. It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e., with knowledge of the falsity and with intent to deceive) must exist. This does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys, or of other federal laws and regulations are not remediable; it merely means that such are not remediable under the FCA or the citizen's suit provisions contained therein.

Plaintiff misses one important point in her thorough and exhaustive briefing of this case. She says @ pg. 15 of her memo: " . . . the burden of establishing that there is no genuine issue of material fact lies with the moving party and the resolution of all doubts should be in favor of the party opposing motion." In the situation where the party opposing the motion has the ultimate burden of proof, this has not been the law since 1986. In the most important of the famous summary judgment trilogy of cases, the Supreme Court changed the rules – regardless of which party makes the motion, the party with the

ultimate burden of proof at trial must show that there is a triable issue of fact. (*Celotex* '86 477 US 317, 91 LEd2d 265.) Since plaintiff has the ultimate burden at trial to show that a false claim was made, it is plaintiff's burden on this motion to show that there is sufficient to take that question to the trier of fact. That burden has not been met.

Plaintiff shows that there is substantial evidence that LAUSD has committed violations of the rules and regulations governing it, particularly in the area of having the classroom teachers present at conferences and moving eligible children promptly into appropriate programs. What she has not shown is that any particular false representation has been made to obtain federal money for the IDEA programs. This may be because the FCA was written with a different claims procedure in mind. The usual defense contractor must certify that its product meets certain standards or specifications when billing the government for contractual work. False statements in such certifications can and do bring *qui tam* actions under FCA. IDEA is administered entirely different. None of the required documents submitted to the California Department of Education (CDOE), who administers the disbursement of state and federal funds for IDEA, requires that the applying school district certify that certain facts are true. This does not mean that there are not enforcement mechanisms, but they do not rely on certifications of fact for their efficacy. Instead, the state audits the programs and also investigates and holds hearings on complaints. Here, plaintiff has invoked those enforcement mechanisms. Between 1989 and 1992, she has made numerous complaints to CDOE (and one to USDOE), a

number of which were sustained with a CDOE finding that the LAUSD was not in compliance with program requirements. Thus, as set forth above, there is ample evidence that LAUSD has violated IDEA requirements. However, plaintiff has not been able to point to any certifications or other statements of fact made to CDOE or USDOE which contain falsehoods. Plaintiff, in effect, argues that FCA should be expanded by judicial interpretation to cover any violation of federal regulations or conditions of grants whether or not a false statement of fact made with scienter can be pointed to. The statute is not susceptible to such interpretation.

The closest that plaintiff appears to come is the statement in the tri-annual certifications, which state that the district " . . . will meet all applicable requirements of state and federal laws and regulations. . . . " To show that this promise of future performance is a false representation, plaintiff would have to show evidence that the promise was made without intent to perform it. This, of course, is difficult to prove (as any judge who has tried "promissory fraud" cases knows) and plaintiff has advanced no evidence of such promissory fraud here. The most it has shown is that there is evidence of instances of non-compliance, but this, of course, does not tend to show that the promise was made without intent to perform it. Thus, summary judgment must be granted on the claim of violation of FCA.

The claim for retaliation stands on a different footing. Plaintiff has shown numerous actions of what appear to be adverse personnel actions taken against her subsequent to the filing of her first complaints internally within the district and with CDOE. Defendant says that

she cannot show that these actions were taken in retaliation for her whistleblowing activities, but the timing of them and the persons pursuing them give rise to sufficient contrary inferences that the matter must be submitted to a trier of fact. The principal argument made by defendant is that plaintiff cannot show that any of her internal complaints or complaints to CDOE were made " . . . in furtherance of an action under this section, including investigation for, initiation of, . . . or assistance in an action filed or to be filed under this section [the FCA] . . . " (31 USC Section 3730(h)). It is pointed out that there was a long period (18 months) between the last complaint and the filing of this action (more were filed later) and that plaintiff fessed up that she did not even know of the FCA until after most of her complaints and that, therefore, she could not have been intending that the internal complaints she made or the administrative procedures she started were investigation for the filing of this action. The difficulty with all this is that under the most recent (and only appellate) case interpreting Section 3730(h), none of this is decisive. The Aug. 31, 1994, decision in *Neal* 7 Cir '94 ___ F3d ___, 1994 USApp Lexis 23785 is decisive for this court. As said in the usual lucid and vigorous writing style of Judge Easterbrook, it is the first appellate opinion to interpret the retaliation section of FCA. It makes it clear that the activities which led to the alleged retaliation need not have been taken by the employee with the FCA in mind (in that case the employee did not learn of FCA for 5 years after the false certification and many years after the retaliation but was

saved by the 6 year limitations period). All that is necessary is that the employee's investigatory or whistleblowing activity must be such that, by hindsight, it can be seen that such could reasonably have led to an FCA suit. Further, that internal complaints designed to correct the false claims (there, complaints to corporate counsel) are enough to qualify as the acts to trigger retaliation protection. From the case, it is clear that the motivation for the complaints (whether merely to correct false claims or to start an FCA lawsuit) is irrelevant, as is knowledge of the FCA itself. The court accepts the compelling logic of Judge Easterbrook's opinion even though the case is not technically binding in the 9th Circuit. Certainly, it is compelling in the absence of 9th Circuit authority.

Defendant complains that the opinion is not published and may not be cited to a district court. Defendant is wrong in both respects. The opinion does not say it is not to be published and such a result would be astounding in view of its precedent making potential. Defendant cites a 9th Circuit rule that says that an opinion to be published has to be specially marked for publication, but such a rule hardly applies in the 7th Circuit. Further, the rule against citing of non-published opinions does not apply to the district court, although this court expects lawyers to adhere to it. In any event, it is not binding precedent and is only as useful as its logic supports it, like any district court opinion (many of which were cited by defendant). Believing that the opinion is or will be published, and accepting its logic whether it is or not, the court considers the opinion as wholly persuasive.

Applying the standards of the *Neal* case, there is a triable issue of fact on retaliation. Plaintiff took action

which could, whether she realized it or not at the time, have led reasonably to an FCA suit. Following such action, adverse personnel action was taken against her. The facts are such that a trier of fact could conclude that the adverse personnel action was in retaliation for the internal and DCOE complaints. The only doubtful question is whether, viewed retroactively, the FCA action if hypothetically later filed, must be held to have legal merit. In the *Neal* case, even though no FCA action was ever filed, the employer paid the United States a substantial sum of money in pre-suit settlement and certain employees were convicted of fraud. The 7th Circuit took this as ample indication of the merit of the potential but unfiled FCA action. This case is not that easy. There is evidence of violation of federal laws and regulations, but the argument that there was a false claim depended on stretching the statute, in the court's opinion, beyond its terms to include a "constructive" false claim shown by violation of the regulation, or inferring backward from a promise which was not carried out that there was no intent to carry it out. This court finds such legally insufficient, but applying the test suggested in dictum in the *Neal* case – whether the claim was frivolous within the meaning of Rule 11 – obviously the claim had sufficient merit to survive that test. Accordingly, the court concludes that the retaliation claim has sufficient legal merit to survive this summary judgment motion and that a triable issue of fact exists as to whether retaliation can be shown. The summary judgment motion is denied as to the retaliation claim.

A:932441.03

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA EX REL. SHEILA HOPPER, **PLAINTIFF,** **V.** **LOS ANGELES UNIFIED SCHOOL DISTRICT, WILLIAM ANTON, LEONARD BRITTON, PAUL CARR, PHILLIP CALLISON, JAMES ESTERLE, DEANNE NEIMAN, BENITA CHAUM, CAROL ALBRIGHT, AND JACKIE THOMPSON,** **DEFENDANTS.**	**Case No. 93-2441 HLH (kx)** **CIVIL JUDGMENT (F.R.C.P. Form 31) (Docket Entry Dec. 2, 199[illegible])**

This action came on for trial before the Court and a jury, the Honorable Harry L. Hupp, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is hereby Ordered and Adjudged

that the plaintiff, Sheila Hopper, recover of the defendant Jackie Thompson and of the Los Angeles Unified School District, the sum of $50,000.00 in compensatory damages and from defendant Jackie Thompson only $5,000.00 in punitive damages, and her attorneys' fees and litigation costs;

and that the plaintiff, Shiela Hopper, take nothing of defendants William Anton, Leonard Britton, Paul Carr, Phillip Callison, James Esterle, Deanne Neiman, Benita Chaum and Carol Albright, and that the action be dismissed on the merits as to defendants William Anton, Leonard Britton, Paul Carr, Phillip Callison, James Esterle, Deanne Neiman, Benita Chaum and Carol Albright.

DATED: Nov. 30, 1994

/s/ Harry L. Hupp
Harry L. Hupp
Judge, United States
District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV93-2441-HLH **Date** Jan. 9, 1995

Title Hopper v. Los Angeles Unified School District

DOCKET ENTRY

Entered January 9, 1995

PRESENT:

HON. HARRY L. HUPP, JUDGE

Milli Borgarding _____

Deputy Clerk **Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

James H. Fosbinder

ATTORNEYS PRESENT FOR DEFENDANTS:

B. B. Garcia

PROCEEDINGS:

MOTION TO VACATE JUDGMENT

ORDER (also, if applicable, findings and memorandum opinion):

The motion to vacate the judgment is denied.

Defendant claims that the judgment was prematurely entered before defendant's objections could be considered. The judgment was lodged on 11/21/94. Local Rule 14.6 provides that objections must be filed within 5 court days. The judgment was signed on 11/30/94 after being

held 9 calendar days. However, defendant points out that Thanksgiving and the following Saturday and Sunday are 3 of those days which must be subtracted, leaving 6 days, and that FRCP 6(e) adds 3 more days to the 5 provided by Local Rule for defendant to file its objections. This means that the court was in fact premature in signing the judgment.

However, no harm, no foul. Defendant points out things which could have been done differently if the judgment had not been prematurely signed. First, defendant says that the court did not take into account the summary judgment. This is a nonsense point – rulings on summary judgment are not recited in the judgment. Second, defendant says that defendants could have applied for fees on the claim dismissed on the summary judgment motion. Such a motion is not precluded by the judgment, which reflects the jury's verdict. However, this motion would not be granted on the facts of this case in any event. Third, defendant says that punitive damages may not be awarded against Ms. Thompson. This is not a matter to take up when rendering judgment on the jury verdict but is the subject of a post-judgment motion.

Thus, none of the items defendant wished to include in the objections to the judgment have any merit. Thus, there is no need to set the judgment aside. This minute order is without prejudice to any timely filed post-judgment motions.

A:932441.19

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV93-2441-HLH **Date** January 23, 1995

Title U.S.A. ex rel. Sheila Hopper v. Los Angeles Unified School District, et al.

DOCKET ENTRY

Entered January 23, 1995

PRESENT:

HON. HARRY L. HUPP, JUDGE

Milli Borgarding **Deputy Clerk** **Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
James Fosbinder

ATTORNEYS PRESENT FOR DEFENDANTS:
Augustin R. Jiminez

PROCEEDINGS:

DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW; PLAINTIFF'S MOTION FOR ATTORNEYS' FEES

ORDER (also, if applicable, findings and memorandum opinion):

The motion for judgment as a matter of law (formerly known as a motion for judgment notwithstanding the verdict) is granted in one aspect only: the judgment for punitive damages is eliminated from the judgment. In all

other respects, the motion is denied and the judgment stands as originally rendered. The motion for an award of attorney's fees is continued to Feb. _____, at 10AM, for plaintiff to recalculate fees in accord with the principles stated below and to allow defendant to comment on that recalculation and the one presented with the reply memo.

With respect to whether a retaliation action may be pursued at all in the absence of a viable claim under the False Claims Act (FCA), the court adheres to the views expressed at the time of the motion for summary judgment (see minute order of 10/3/94). Relying on *Neal* 7Cir'94 33 F3d 860, this court determined that the retaliation claim was viable even though the FCA claim was not.

With respect to the strength of the evidence to support the jury's verdict, it is determined that the evidence was sufficient to support the verdict. Defendants argue their version of the evidence, but the contrary evidence or implications drawn from it are sufficient to support the jury's conclusion that plaintiff was retaliated against for her whistle blowing activities. The court took some pains to inform the jury about the causation problem – the defendants could not be held liable if plaintiff's damages came from some other source than retaliation for the complaints made against the district. There is no reason to believe that the jury disregarded these instructions. While defendants' arguments were quite strong that plaintiff's damages were attributable to factors other than retaliation, the jury was not persuaded and the court may not substitute its judgment for that of the jury. Further, the evidence was sufficient to show that defendant Thompson had access to knowledge of the complaints.

The new briefing on the question of punitive damages makes it clear that punitive damages are not awardable under the retaliation section. The congressional history makes it clear that punitive damages, while in the bill at the start, were removed during the passage of the bill through Congress, and that this was deliberate, as shown by the committee report which recites that the remedy provided is a "make whole" remedy – i.e., one without double damages or punitive damages as first proposed. Accordingly, the punitive damages are removed from the judgment. Defendants are to provide forthwith for the court's signature a form of revised judgment deleting the punitive damages, which shall be final (i.e., shall start appeal time) as soon as entered with the court reserving jurisdiction to later make a fee award (see below).

The fee matter is continued because it is not yet ripe for decision. Plaintiff submitted a revised calculation of fees with her reply papers on this motion, and defendant has not had a chance to comment on that revision. In addition, the court thinks that further revisions are required and desires that plaintiff propose the amounts thereof. First, as plaintiff apparently realizes, Ms. Rhonda Fosbinder's time cannot be included with the attorney time (up to the date she was admitted). It could, however, be included in law clerk time if it has not already been. If not done already, the figures should be revised to accomplish this. The court does *not* find that plaintiff's attorney is in bad faith in this matter or that fees should be declined altogether as some sort of sanction. Second, while plaintiff says that she has already excluded time attributable solely to the FCA claim (a proper exclusion),

it is implied that some of the time included in the fee request is jointly attributable to the FCA and to the retaliation claim. This time should be identified and prorated. Plaintiff is to suggest a reasonable proration but provide figures so that second guessing can be done. Third, the retaliation claims made against many of the individual defendants other than Thompson had little basis in fact, yet much attorney time was devoted to them. Recognizing that the claim against defendant Thompson was the most important of the retaliation claims, nevertheless, there should be a proration to exclude a portion of the time attributable to claims against the exonerated individual defendants. The court will consider such items as the proper lodestar rate, any multiplier, or any reduction for non-productive (i.e., injunction) or inadequately described items at the continued hearing on this motion.

Plaintiff to file revised calculations with any support therefore by 1/30/95, with any response due 2 weeks before the continued date.

A:932441.123

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Ex Rel. SHEILA HOPPER, Plaintiff -Appellant, v. WILLIAM ANTON; LOS ANGELES UNIFIED SCHOOL DISTRICT; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE; DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT; JACKIE THOMPSON, Defendants-Appellees.	No. 95-55273 D.C. No. CV-93-02441-HLH
UNITED STATES OF AMERICA Ex Rel. SHEILA HOPPER, Plaintiff-Appellee, v. WILLIAM ANTON; LEONARD BRITTON; PAUL CARR; PHILLIP CALLISON; JAMES ESTERLE, DEANNE NEIMAN; BENITA CHAUM; CAROL ALBRIGHT, Defendants. and JACKIE THOMPSON; LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendants-Appellants.	No. 95-55374 D.C. No. CV-93-02441-HLH **ORDER** (Filed Sep. 13, 1996)

Before: FARRIS, FERNANDEZ and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person received a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to

> conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information.

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. – for purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION. – This section does not apply to claims, records, or statements made under the internal Revenue Code of 1986.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272 § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

31 U.S.C. § 3730. Civil Actions For False Claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and

served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. – (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person

initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense).

When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera, that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. for purposes of the preceding sentence, a finding or conclusion in final if it has been finally determined on appeal to the appropriate court of the United States. If all time

for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. – (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing. In a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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[1] So in original. Probably should be "General".

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the

action, the court may award to the defendant is reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED. – (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil,

or administrative hearing, in a congressional, administrative, or Government[2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. – The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make

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[2] So in original. Probably should be "General".

the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action to the appropriate district court of the United States for the relief provided in this subsection.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub. L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub. L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub. L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362.)

34 C.F.R. 300 *et seq.*

Subpart A – General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 300.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

(b) To insure that the rights of handicapped children and their parents are protected.

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. 1401 Note)

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§ 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency

on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency,

(2) Local educational agencies and intermediate educational units,

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 300.400-300.403)

(Authority: 20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

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§ 300.3 Regulations that apply to assistance to States for education of handicapped children.

(a) *Regulations.* The following regulations apply to this program of Assistance to States for Education of Handicapped Children.

(1) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 76 (State-Administered Programs), part 77 (Definitions that apply to Department Regulations), and part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(2) The regulations in this part 300.

(b) *How to use regulations; how to apply for funds.* The "Introduction to Regulations of the Department" at the beginning of EDGAR includes general information to assist in –

(1) Using regulations that apply to Department programs; and

(2) Applying for assistance under a Department program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

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§ 300.4 Free appropriate public education.

As used in this part, the term *free appropriate public education* means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 300.340-300.349 of Subpart C.

(Authority: 20 U.S.C. 1401(18))

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§ 300.7 Intermediate educational unit.

As used in this part, the term *intermediate educational unit* means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(Authority: 20 U.S.C. 1401(22))

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§ 300.8 Local educational agency.

(a) [Reserved]

(b) For the purposes of this part, the term *local educational agency* also includes intermediate educational units.

(Authority: 20 U.S.C. 1401(8))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

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§ 300.11 Public agency.

As used in this part, the term *public agency* includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children.

(Authority: 20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

Subpart B – State Annual Program Plans and Local Applications

Annual Program Plans – General

§ 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Secretary through its State educational agency.

(Authority: 20 U.S.C. 1232c(b), 1412, 1413)

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§ 300.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(Authority: 20 U.S.C. 1412, 1413, 1232c(b))

ANNUAL PROGRAM PLANS – CONTENTS

§ 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 300.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with § 300.122.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3))

[42 FR 42476, Aug. 23, 1977, Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

LOCAL EDUCATIONAL AGENCY APPLICATIONS – GENERAL

§ 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(Authority: 20 U.S.C. 1414(a))

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§ 300.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved

by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 300.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 300.592.

(Authority: 20 U.S.C. 1414(b)(2))

LOCAL EDUCATIONAL AGENCY APPLICATIONS – CONTENTS

§ 300.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical

method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(Authority: 20 U.S.C. 1414(a)(1)(A))

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 300.560-300.576 of Subpart E.

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§ 300.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 300.340-300.349 of Subpart C.

(Authority: 20 U.S.C. 1414(a)(5))

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§ 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational

agency has procedural safeguards which meet the requirements of §§ 300.500-300.514 of Subpart E.

(Authority: 20 U.S.C. 1414(a)(7))

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§ 300.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(Authority: 20 U.S.C. 1414(a))

INDIVIDUALIZED EDUCATION PROGRAMS

§ 300.340 Definition.

As used in this part, the term *individualized education program* means a written statement for a handicapped child that is developed and implemented in accordance with §§ 300.341-300.349.

(Authority: 20 U.S.C. 1401(19))

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§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and

implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412(4), (6); 1413(a)(4))

Comment. This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

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§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in

effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142. Sec. 8(c) (1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

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§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter,

meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to held a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

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§ 300.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provisions of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(Authority: 20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the *teacher* could be the child's special education teacher. If the child's handicap is a speech impairment, the *teacher* could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the *teacher* could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative, should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Subpart G – Allocation of Funds; Reports

Allocations

§ 300.700 Special definition of the term State.

For the purposes of § 300.701, § 300.702, and §§ 300.704-300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(Authority: 20 U.S.C. 1411(a)(2))

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§ 300.701 State entitlement; formula.

(a) The Secretary calculates the maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year as follows:

(1) If the State is eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average

per pupil expenditure in public elementary and secondary schools in the United States.

(2) If the State is not eligible for a grant under section 619 of the Act, the maximum entitlement is equal to the number of handicapped children aged six through 21 in the State who are receiving special education and related services, multiplied by 40 percent of the average per pupil expenditure in public elementary and secondary schools in the United States.

(Authority: 20 U.S.C. 1411(a)(1))

(b) [Reserved]

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during the preceding year.

(Authority: 20 U.S.C. 1411(a)(4))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 18255, Apr. 27, 1989]

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§ 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 300.701 of this subpart, the Secretary may not count:

(1) If a State serves all handicapped children aged three through five in the State, the Secretary does not count handicapped children aged three through 17 in the State to the extent that the number of those children is greater than 12 percent of the number of all children aged three through 17 in the State;

(2) If a State does not serve all handicapped children aged three through five in the State, the Secretary does not count handicapped children aged five through 17 to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State; and

(3) The Secretary does not count handicapped children who are counted under Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary School Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged three through 17 and five through 17 in any State is determined by the Secretary on the basis of the most recent satisfactory data available.

(Authority: 20 U.S.C. 1411(a)(5))

[42 FR 42476, Aug. 23, 1977, as amended at 42 FR 65083, Dec. 29, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and further amended at 54 FR 18255, Apr. 27, 1989; 54 FR 27303, June 28, 1989]

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§ 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(Authority: 20 U.S.C. 1411(g)(1))

(b) *Reporting dates for local educational agencies and reallocations.* (1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in § 300.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(Authority: 20 U.S.C. 1411(g)(2))

REPORTS

§ 300.750 Annual report of children served – report requirement.

(a) The State educational agency shall report to the Secretary no later than February 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(Authority: 20 U.S.C. 1411(a)(3))

(b) The State educational agency shall submit the report on forms provided by the Secretary.

(Authority: 20 U.S.C. 1411(a)(3))

Comment. It is very important to understand that this report and the requirements that relate to it are solely for

allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged three through 17 (in States that serve all handicapped children aged three through five) or five through 17 (in states that do not serve all handicapped children aged three through five), a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make a free appropriate public education available to all of those handicapped children.

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 7551, Feb. 4, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and further amended at 54 FR 18255, Apr. 27, 1989]

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§ 300.751 Annual report of children served – information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on December 1 of that school year;

(2) The number of handicapped children aged three through five who are receiving a free appropriate public education;

(3) The number of those handicapped children aged six through 21 within each disability category, as defined in the definition of "handicapped children" in § 300.5 of Subpart A; and

(4) The number of those handicapped children aged three through 21 for each year of age (three, four, five, etc.).

(b) For the purpose of this part, a child's age is the child's actual age on the date of the child count: December 1.

(c) The State educational agency may not report a child aged six through 21 under more than one disability category.

(d) If a handicapped child aged six through 21 has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(Approved by the Office of Management and Budget under control number 1820-0043)

(Authority: 20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 7551, Feb. 4, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980; 49 FR 48525, Dec. 12, 1984, and further amended at 54 FR 18256, Apr. 27, 1989; 54 FR 27303, June 28, 1989]

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§ 300.752 Annual report of children served – certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

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§ 300.753 Annual report of children served – criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under Subpart 2 of Part D of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 300.186(b) of subpart B.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. *Special education,* by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Department expects that there would only be limited situations where special education would be clearly separate from regular education – generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

[42 FR 42476, Aug. 23, 1977, Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 18256, Apr. 27, 1989; 54 FR 27303, June 28, 1989]

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§ 300.754 Annual report of children served – other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 300.750(a);

(c) Obtain certification from each agency and institution that an undulplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Secretary to audit the accuracy of the count.

(Authority: 20 U.S.C. 1411(a)(3); 1417(b))

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Secretary in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

28 U.S.C. § 1400 *et seq.*

CHAPTER 33 – EDUCATION OF INDIVIDUALS WITH DISABILITIES

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SUBCHAPTER I – GENERAL PROVISIONS

Subchapter Referred to in Other Sections

This subchapter is referred to in section 1491a of this title.

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that –

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide

effective special education and related services to meet the needs of children wit disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

SUBCHAPTER II – ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 927, 1407, 1422, 1423, 1424, 1441, 1476, 1477, 1478, 1479, 1482, 1491n, 2321, 2325, 4304, 7908, 8066 of this title; title 10 section 2164; title 29 section 721, 2211, 2231, 2243; title 42 sections 290ff-1, 290ff-2, 1396b, 12511.

§ 1411. Entitlements and allocations

(a) Formula for determining maximum State entitlement

(1) Except as provided in paragraph (5), the maximum amount of the grant for which a State is entitled under this section for any fiscal year is –

(a) the sum of –

(i) the number of children with disabilities in the State, aged 6 through 21, who are receiving special education and related services, as determined under paragraph (3); and

(ii) if the State is eligible for a grant under section 1419 of this title, the number of such children in the State, aged 3 through 5; multiplied by

(B) 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

(2) For the purpose of this section, the term "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(3) The number of children with disabilities receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Secretary may not count –

(i) children with disabilities aged three to seventeen, inclusive, in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 percent of the

number of all children aged three to seventeen, inclusive, in such State, or the combined percentage of such children counted by the Secretary for the purpose of making fiscal year 1994 allocations under this section and under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as such subpart was in effect on the day preceding October 20, 1994), whichever is greater, if the State serves all children with disabilities aged three to five, inclusive, in the State pursuant to State law or practice or the order of any court, and

(ii) children with disabilities aged five to seventeen, inclusive, in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 percent of the number of all children aged five to seventeen, inclusive, in such State, or the combined percentage of such children counted by the Secretary for the purpose of making fiscal year 1994 allocations under this section and under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as such subpart was in effect on the day preceding October 20, 1994), whichever is greater, if the State does not serve all children with disabilities aged three to five, inclusive, in the State pursuant to State law or practice or the order of any court.

(B) For purposes of subparagraph (A), the number of children aged three to seventeen, inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to the Secretary.

(b) Minimum amount of funds to States for fiscal years 1995 to 1999

(1) Notwithstanding subsections (a) and (g) of this section, no State shall receive an amount under this section for any of the fiscal years 1995 through 1999 that is less than the sum of the amount such State received for fiscal year 1994 under –

(A) this section; and

(B) subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as such subpart was in effect on October 20, 1994) for children with disabilities aged 3 through 21.

(2) If, for fiscal year 1998 or 1999, the number of children determined under subsection (a)(3) of this section for any State is less than the total number of children with disabilities, aged 3 through 21, counted for that State's fiscal year 1994 grants under this section and under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as such subpart was in effect on October 20, 1994), then the amount determined under paragraph (1) for that State shall be reduced by the same percentage by which the number of those children so declined.

(3)(A) If the sums made available under this subchapter for any fiscal year are insufficient to pay the full amounts that all States are eligible to receive under paragraphs (1) and (2) for such year, the Secretary shall ratably reduce the allocations to such States for such year.

(B) If additional funds become available for making payments under paragraphs (1) and (2) for such fiscal

year, allocations that were reduced under subparagraph (A) shall be increased on the same basis as such allocations were reduced.

(c) Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(1) Of the funds received under subsection (a) of this section by any State for any fiscal year –

(A) a State may use not more than 25 percent of such funds in accordance with paragraph (2); and

(B) except as provided in paragraph (4), the State shall distribute at least 75 percent of such funds to local educational agencies and intermediate educational units, in accordance with subsection (d) of this section, for use in accordance with priorities established under section 1412(3) of this title.

(2)(A) From the funds that any State may use under paragraph (1)(A) for any fiscal year, the State –

(i) may use 5 percent of the funds received under this section or $450,000, whichever is greater, for administrative costs related to carrying out sections 1412 and 1413 of this title; and

(ii) shall use the remainder –

(I) to provide support services and direct services, subject to subparagraph (B), in accordance with priorities established under section 1412(3) of this title; and

(II) for the administrative costs of monitoring and complaint investigation, but

only to the extent that such costs exceed the costs of administration incurred during fiscal year 1985.

(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a)(9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if –

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than $7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to children with disabilities residing in the area served by such local educational agency or such intermediate educational

unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

(d) Allocation of funds within States to local educational agencies and intermediate educational units

(1) From the total amount of funds available for any fiscal year under subsection (c)(1)(B) of this section, the State shall provide to each local educational agency or intermediate educational unit an amount that bears the same ratio to such total amount as the number of children, aged 3 through 21, determined under subsection (a)(3) of this section for such agency or unit bears to the total number of such children determined for all such agencies and units that apply for such funds.

(2)(A) To the extent necessary, the State –

(i) shall use funds available under subsection (c)(2)(A)(ii) of this section to ensure that each State agency that received funds for fiscal year 1994 under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as such subpart was in effect on the day preceding October 20, 1994) receives, from the sum of such funds and funds provided under paragraph (1), an amount equal to –

(I) the number of children, aged 6 through 21, determined under subsection (a)(3) of this section for such agency; multiplied by

(II) the per-child amount provided under such subpart for fiscal year 1994; and

(ii) may use such funds to ensure that each local educational agency that received for fiscal year 1994 under such subpart for children who had transferred from a State-owned, State-operated, or State-supported school or program assisted under such subpart receives, from the sum of such funds and funds provided under paragraph (1), an amount for each such child, aged 3 through 21, determined under subsection (a)(3) of this section for such agency, equal to the per-child amount the agency received under such subpart for fiscal year 1994.

(B) For the purpose of subparagraph (A), the number of children determined under subsection (a)(3) of this section for any State agency or local educational agency shall not exceed the number of children aged 3 through 21 for whom such agency received funds under such subpart for such fiscal year.

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§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect

prior to November 29, 1975, and submitted not later than August 21, 1975,which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –

(A) there is established (i) a goal of providing full educational opportunity to all children with disabilities, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that

a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5)of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the

responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

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§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information as the Secretary deems necessary. Each such plan shall –

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the

provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in section 1476(b)(8) of this title, a comprehensive system of personnel development that shall include –

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including –

(i) the development and maintenance of a system for determining, on an annual basis –

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other

basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed, and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors;

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including –

(I) the number of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that –

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of higher education, and professional associations to recruit, prepare and retain qualified

personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including –:

(i) a system for the continuing education of regular and special education and related services personnel.

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials and technology.[1]

(4) set forth policies and procedures to assure –

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that –

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[1] So in original. The period probably should be a semicolon.

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for –

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter –

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor of any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities, teachers, parents or guardians of children with disabilities, State and local education officials, and administrators of programs for children with disabilities, which –

(A) advises the State educational agency of unmet needs within the State in the education of children with disabilities.

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to –

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including –

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is

taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State; and

(15) set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program assisted under subchapter VIII of this chapter who will participate in preschool programs assisted under this subchapter, including a method of ensuring that when a child turns age three an individualized education program, or, if consistent with sections 1414(a)(5) and 1477(d) of this title, an individualized family service plan, has been developed and is being implemented by such child's third birthday.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for children with disabilities, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

(1) The Secretary shall approve any State plan and any modification thereof which –

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) Participation of children with disabilities in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1982, a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all children

with disabilities enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the

Secretary based the Secretary's action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State.

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§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall –

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which –

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all children with disabilities, including –

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all children with disabilities, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability, with the most severe disabilities who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that –

(A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter –

(i) shall be used to pay only the excess costs directly attributable to the education of children with disabilities; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant such State and local funds; and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for –

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of children with disabilities participating in programs carried out under this subchapter; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and certification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members

of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in section 1477(d) of this title for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this

section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall –

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational

agency or any intermediate educational unit receiving any notification from the State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency –

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may relocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all children with disabilities residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of children with disabilities pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

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§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to –

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit –

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification,

evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge

or training with respect to the problems of children with disabilities.

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without

regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in section 1401(a)(20) of this title.

(iii) If a parent or guardian of a child described in clause (i) requests a due process hearing pursuant to paragraph (2) of subsection (b) of this section, then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless

the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in section 921 of title 18.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if –

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that –

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsection (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

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§ 1416. Withholding of payments

(a) Failure to comply with this subchapter; limitations; public notice

Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds –

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the

application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan, the Secretary –

(A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and

(B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within the Secretary's jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of children with disabilities.

If the Secretary withholds further payments under clause (A) or clause (B) the Secretary may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within the Secretary's jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of children with disabilities, or payments by the State educational agency under this subchapter shall be limited to local educational agencies

and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b) Judicial review

(1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

California Education Codes

§ 56341. Individualized education program team; review of individualized education program; legislative intent

(a) Each meeting to develop, review, or revise the individualized education program of an individual with exceptional needs, shall be conducted by an individualized education program team.

(b) The individualized education program team shall include all of the following:

(1) A representative other than the pupil's teacher designated by administration who may be an administrator, program specialist, or other specialist who is knowledgeable of program options appropriate for the pupil and who is qualified to provide, or supervise the provision of, special education.

(2) The pupil's present teacher. If the pupil does not presently have a teacher, this representative shall be the teacher with the most recent and complete knowledge of the pupil who has also observed the pupil's educational performance in an appropriate setting. If no such teacher is available, this representative shall be a regular classroom teacher referring the pupil, or a special education teacher qualified to teach a pupil of his or her age.

(3) One or both of the pupil's parents, a representative selected by the parent, or both, pursuant to Public Law 94-142.

(c) When appropriate, the team shall also include:

(1) The individual with exceptional needs.

(2) Other individuals, at the discretion of the parent, district, special education local plan area, or county office who possess expertise or knowledge necessary for the development of the individualized education program.

(d) If the team is developing, reviewing, or revising the individualized education program of an individual with exceptional needs who has been assessed for the purpose of that individualized education program, the district, special education local plan area, or county office, shall ensure that a person is present at the meeting who has conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used to assess the pupil and is familiar with the results of the assessment. The person shall be qualified to interpret the results if the results or recommendations, based on the assessment, are significant to the development of the pupil's individualized education program and subsequent placement.

(e) For pupils with suspected learning disabilities, at least one member of the individualized education program team, other than the pupil's regular teacher, shall be a person who has observed the pupil's educational performance in an appropriate setting. If the child is younger than five years or is not enrolled in a school, a team member shall observe the child in an environment appropriate for a child of that age.

(f) The parent shall have the right to present information to the individualized education program team in

person or through a representative and the right to participate in meetings relating to eligibility for special education and related services, recommendations, and program planning.

(g) It is the intent of the Legislature that the individualized education program team meetings be nonadversarial and convened solely for the purpose of making educational decisions for the good of the individual with exceptional needs. However, if the public education agency uses an attorney during any part of the individualized education program meeting, that use shall be governed by the provisions of Section 56507.

(Added by Stats.1980, c. 797, p. 2434, § 9, urgency, eff. July 28, 1980. Amended by Stats.1980, c. 1353, p. 4830, § 58, urgency, eff. Sept. 30, 1980; Stats.1981, c. 1044, p. 4009, § 10; Stats.1982, c. 1201, p. 4355, § 19, urgency, eff. Sept. 22, 1982; Stats. 1987, c. 1452, § 478; Stats.1988, c. 1508, § 3.)

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§ 56341. Individualized education program team; review of individualized education program; electronic recording of meetings; legislative intent

(a) Each meeting to develop, review, or revise the individualized education program of an individual with exceptional needs, shall be conducted by an individualized education program team.

(b) The individualized education program team shall include all of the following:

(1) A representative other than the pupil's teacher designated by administration who may be an administrator, program specialist, or other specialist who is knowledgeable of program options appropriate for the pupil and who is qualified to provide, or supervise the provision of, special education.

(2) The pupil's present teacher. If the pupil does not presently have a teacher, this representative shall be the teacher with the most recent and complete knowledge of the pupil who has also observed the pupil's educational performance in an appropriate setting. If no teacher is available, this representative shall be regular classroom teacher referring the pupil, or a special education teacher qualified to teach a pupil of his or her age.

(3) One or both of the pupil's parents, a representative selected by the parent, or both, pursuant to * * * the individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).

(c) When appropriate, the team shall also include the following persons:

(1) The individual with exceptional needs.

(2) Other individuals, at the discretion of the parent, district, special educational local plan area, or county office who possess expertise or knowledge necessary for the development of the individualized education program.

(d) If the team is developing, reviewing, or revising the individualized education program of an individual

with exceptional needs who has been assessed for the purpose of that individualized education program, the district, special education local plan area, or county office, shall ensure that a person is present at the meeting who has conducted an assessment of the pupil or who is knowledgeable about the assessment procedures used to assess the pupil and is familiar with the results of the assessment. The person shall be qualified to interpret the results if the results or recommendations, based on the assessment, are significant to the development of the pupil's individualized education program and subsequent placement.

(e) For pupils with suspected learning disabilities, at least one member of the individualized education program team, other than the pupil's regular teacher, shall be a person who has observed the pupil's educational performance in an appropriate setting. If the child is younger than five years or is not enrolled in a school, a team member shall observe the child in an environment appropriate for a child of that age.

(f) The parent shall have the right to present information to the individualized education program team in person or through a representative and the right to participate in meetings relating to eligibility for special education and related services, recommendations, and program planning.

(g)(1) Notwithstanding Section 632 of the Penal Code, the parent, district, special education local plan areas, or county office shall have the right to electronically record the proceedings of individualized education program meetings on an audio tape recorder. The parent,

district, special education local plan area, or county office shall notify the members of the individualized education program team of their intent to record a meeting at least 24 hours prior to the meeting. If the district, special education local plan area, or county office initiates the notice of intent to audio tape record a meeting and the parent objects or refuses to attend the meeting because it will be tape recorded, then the meeting shall not be recorded on a audio tape recorder.

(2) The legislature hereby finds as follows:

(A) Under federal law, audio tape recordings made by a district, special educational local plan area, or county office are subject to the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. See. 1232g).

(B) Parents have the right, pursuant to Sections 99.10 to 99.22, inclusive of Title 34 of the code of Federal Regulations, to (i) inspect and review the tape recordings, (ii) request that the tape recordings be amended if the parent believes that they contain information that is inaccurate, misleading, or in violation of the rights of privacy or other rights of the individual with exceptional needs, and (iii) challenge, in a hearing information that the parent believes is inaccurate, misleading, or in violation of individual's rights of privacy or other rights.

(h) It is the intent of the Legislature that the individualized education program team meetings be nonadversarial and convened solely for the purpose of making educational decisions for the good of the individual with exceptional needs.

(Amended by Stats.1992, c. 106 (A.B.2267), § 2; Stats.1992, c. 1360 (A.B.2773), § 15.3; Stats.1993, c. 1296 (A.B.369), § 14.6, eff. Oct. 11, 1993.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. SHEILA HOPPER, Plaintiff-Appellant/ Cross-Appellee v. WILLIAM ANTON, et al., Defendants-Appellants/ Cross-Appellees	Nos. 95-55273, 95-55374

MOTION OF THE UNITED STATES,
AS REPRESENTED BY THE ATTORNEY GENERAL,
TO AMEND PANEL OPINION

An opinion was issued in the above-referenced case on July 31, 1995. The opinion contains an erroneous description of the *scienter* requirements for a civil claim under the False Claims Act. The troublesome passages are *dicta*; they are in no way necessary to the panel's disposition of the case, but they will likely cause difficulty and confusion in future cases. The United States, as represented by the Attorney General,[1] respectfully seeks

[1] While the United States was not a party to the appeal, we remain a real party "in interest, since this is a *"qui tam"* case filed under the False Claims Act, 31 U.S.C. §§ 3729-3731. *United States ex rel. Hyatt v. Northrop*, 1996 W.L. 417005 *2 (9th Cir. July 26, 1996); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1128

the very brief changes in the language of the opinion described below.

1. The False Claims Act imposes treble-damage liability and penalties upon persons who "knowingly" present false claims. See, 31 U.S.C. 3729(a). "Knowing" and "knowingly" are defined in § 3729(b) to mean "that a person, with respect to information –"

> (1) has actual knowledge of the information;
>
> (2) *acts in deliberate ignorance* of the truth or falsity of the information; *or*
>
> (3) *acts in reckless disregard* of the truth or falsity of the information,

and *no proof of specific intent to defraud is required.* (Emphasis added).

2. The following parts of the panel's description of the scienter element of the False Claims Act contain language (emphasized below) overstating the statutory *scienter* requirement:

> In granting summary judgment, the district court found that Hopper had not met the FCA's scienter and false claim requirements, stating: ["]It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a

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(1994). Alternatively, the Court may view this motion as having been filed by the Attorney General as *amicus curiae*. See, 28 U.S.C. § 517.

> claim under the FCA. Plaintiff assumes that if Los Angeles Unified School District (LAUSD) has violated regulations or law governing the Individuals with Disabilities Education Act (IDEA), it is automatically subject to suit under FCA. The FCA is far narrower. It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e., *with knowledge of the falsity and with intent to deceive)* must exist. This does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys, or of other federal laws and regulations are not remediable; it merely means that such are not remediable under the FCA or the citizen's suit provisions contained therein."
>
> We agree with the district court's analysis of plaintiff's claims. * * *
>
> * * * *For a certified statement to be "false" under the Act, it must be an intentional, palpable lie.* * * *

3. This articulation of the *scienter* needed under the Act could be misread to include both actual knowledge and a specific intent requirement.

The first emphasized passage, part of a quotation of the district court's decision, should have stated "knowledge of the falsity *or* intent to deceive * * *." A footnote should be added to the end of the sentence, "We agree with the district court's analysis of plaintiff's claims." That footnote would read:

> We do not read district court decision as intending to depart from the False Claims Act provision defining "knowing" and "knowingly," 31 U.S.C. § 3729(a).

The second emphasized passage should be changed to "it must be a knowing, palpable lie."

The key here is that "knowledge" under the language of the FCA does not require actual knowledge, but only recklessness. The language the panel decision employed – "intent to deceive" and "an intentional, palpable lie" – requires a higher level of scienter than that specifically delineated in the statute.

4. The panel decision ultimately rests upon the unexceptional proposition that not every violation of a federal regulation will give rise to a violation of the False Claims Act. The changes in the opinion that we advocate would not change the holding of the Court nor its purpose in shielding conduct that should not be exposed to potential liability under the False Claims Act.

CONCLUSION

The language of the panel opinion describing the *scienter* requirement of the False Claims Act should be amended as described above.

Respectfully submitted,

/s/ William Kanter(BGF)
WILLIAM KANTER

/s/ Barbara C. Biddle(BGF)
BARBARA C. BIDDLE

/s/ Bruce G. Forrest
BRUCE G. FORREST

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Washington, D. C. 20530

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of this

MOTION OF THE UNITED STATES,
AS REPRESENTED BY THE ATTORNEY GENERAL,
TO AMEND PANEL OPINION

to be served upon the counsel listed below by causing a copy to be mailed, first class, this 5th day of September, 1996.

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/s/ Bruce G. Forrest
Bruce G. Forrest

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. SHEILA HOPPER, Plaintiff, v. LOS ANGELES UNIFIED SCHOOL DIST., CAROL ALBRIGHT & JACKLYN THOMPSON, Defendants.	No. CV93-2441-HLH (Kx) SPECIAL VERDICT (Filed Nov. 16, 1994)

We, the Jury in the above-entitled case, make the following findings on the issues submitted to us:

Question No. 1: Did plaintiff Sheila Hopper in making complaints about special education procedures within Los Angeles Unified School District, to the California Department of Education, and to the United States Department of Education cause a reasonable and distinct possibility that United States special education funds would be reclaimed by the federal government from Los Angeles Unified School District?

Answer "yes" or "no".

Answer: Yes

if you have answered this question "no", sign and return this verdict. If you have answered "yes", answer the next question.

Question No. 2: Did defendants Jacklyn Thompson, Carol Albright, or other administrators of Los Angeles Unified School District retaliate against Sheila Hopper for the making of complaints known to them about special education procedures to district officials, the California Department of Education, or to the United States Department of Education?

Answer "yes" or "no" by an "X" in the appropriate box as to each defendant:

Name	Yes	No
Jacklyn Thompson	✓	_
Carol Albright	_	✓

Other administrators of the Los Angeles Unified School District:

	_	✓

If you have answered Question No. 2 "no" as to all defendants, sign and return this verdict. If you have answered "yes" as to some defendants, answer the next question.

Question No. 3: Did plaintiff Sheila Hopper suffer damages as a proximate result of such retaliation which was a substantial factor in causing the damage and which would not have occurred without the act of retaliation?

Answer "yes" or "no".

Answer: Yes

If you have answered Question No. 3 "yes", fix the amount of damages in answer to the next question. If you have answered "no", sign and return this verdict.

Question No. 4: What is the amount of damages suffered from the causes as to which you have answered "yes" in Question No. 3?

Answer with a dollar figure.

Answer: $50,000.00

If you have found an amount of damages in answer to Question No. 4, and have given a "yes" answer to any individual defendant in your answer to Question No. 2, answer the next question. Otherwise, sign and return this verdict form.

Question No. 5: Do you in your discretion find pursuant to the standards in the court's instruction that punitive damages should be awarded against any of the individual defendants as to whom you have answered "yes" in Question No. 2?

Answer by placing an "x" for "yes" or "no" as to any individual defendant as to whom you have given a "yes" answer in Question No. 2.

Name	Yes	No
Jacklyn Thompson	✓	—
Carol Albright	—	✓

If you have answered "no" as to each individual defendant, sign and return this verdict. If you have answered "yes" to either, fix the amount of punitive damages in answer to the next question.

Question No. 6: What amount of punitive damages do you fix? Answer with a dollar amount only as to those individual defendants as whom you have given a "yes" answer to the previous question.

Answer: Name	Dollar Award
Jacklyn Thompson	$5,000.00
Carol Albright	$_____

Dated November 16, 1994.

/s/ Jackie Andrews
Presiding Juror

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA EX REL. SHEILA HOPPER, **Appellant,** **v.** **LOS ANGELES UNIFIED SCHOOL DISTRICT, et al.** **Appellees.** **AND RELATED CROSS-ACTION**	**No. 95-55273/95-55374 (USDC No. 93-2441 HLH)** **REQUEST FOR JUDICIAL NOTICE** (Filed Feb. 2, 1996)

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Plaintiff and appellant in the above-captioned matter, SHEILA HOPPER, hereby requests that judicial notice pursuant to Fed.R.Evid. 201(f) be taken of the *Chanda Smith v. LAUSD Consultants' Report* and *Consent Decree*

and Order Thereon which are part of the court record in the matter of *Chanda Smith v. LAUSD*, USDC No. CV-93-7044-LEW (GHKx) (Central District). A true and correct copy of each document is attached hereto as Exhibit "A" and Exhibit "B", respectively.

Although not reported as such by defendants'/appellees' counsel during the proceedings in the court below, the *Chanda Smith* matter was at the time of the litigation in the court below, and is now, related to the instant action in that both matters resolve around issues of proof of noncompliance with state and federal statutory special education laws. Counsel for appellees' (who is also counsel for defendant LAUSD in the related *Chanda Smith* matter) state in their appellate briefing that " . . . appellant has provided only *de minimis* evidence of District noncompliance" [Reply Brief p.5, para.3]; however, the *Chanda Smith v. LAUSD Consultants' Report* plainly affirms the findings of substantial District-wide noncompliance presented by plaintiff/appellant to the court below via the four state and federal Department of Education noncompliance reports, as well as the information obtained through the discovery process. The Consultant's Report states at page 55:

> The U.S.DOE found the District to be out of compliance and the violations to be so substantial that it has threatened to (a) withhold IDEA funding to the entire State of California unless the CDE take prompt action to correct the situation; and (b) conduct a federal audit of the District's compliance with special education laws. The stakes for the District and the State of California are thus very high and immediate action

must be taken to return the District to compliance.

Chanda Smith v. LAUSD Consultants' Report, p.55.

Fed.R.Evid. 201(b)(2) permits judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases. *See generally*, 9 Wright & Miller, Federal Practice and Procedure § 2410, at 359-61 (1971); *Kasey v. Molybdenum Corp. of America*, 336 F.2d 560 (9th Cir. 1964).

Plainly the fact of the existence of this related matter throughout the entire period of the instant litigation and the resolution thereof has a direct bearing on key factual issues in the instant action. Thus, plaintiff/appellant Sheila Hopper respectfully requests that judicial notice of the aforesaid documents be taken, because they represent the record of the resolution of a case in the court below which is related to the instant action, and because they are necessary to a fair resolution of the matter which is now before this Court.

Respectfully submitted this 23rd day of January, 1996.

FOSBINDER & FOSBINDER

/s/ James H. Fosbinder
JAMES H. FOSBINDER,
Attorneys for Plaintiff

FOSBINDER & FOSBINDER

/s/ Rhonda M. Fosbinder
RHONDA M. FOSBINDER,
Attorneys for Plaintiff

EXHIBIT "A"

Chanda Smith v. LAUSD Consultants Report
October 1995

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DEDICATION

During the drafting of this report one of the lawyers for the plaintiffs, Kathy Krause, passed away. The Consultants wish to emphasize her invaluable contribution to this process and report, not only as an effective advocate for children with disabilities but also a wonderful and courageous individual. She will be missed.

I. EXECUTIVE SUMMARY

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I. EXECUTIVE SUMMARY

This report is jointly submitted by Dr. Louis Barber and Dr. Mary Margaret Kerr pursuant to an interim settlement agreement (the "Interim Settlement Agreement") between the Los Angeles Unified School District (the "District") and class action plaintiffs in federal litigation identified as *Chanda Smith et al. v. Los Angeles Unified School District et al.*, USDC Central District of California Case No. CV 93-7044 LEW (GHKx) (the "Chanda Smith Litigation").

A. Preliminary Statement.

The Interim Settlement Agreement called for two teams of independent expert consultants led, respectively, by Dr. Barber and Dr. Kerr (jointly, the "Consultants") to

conduct a comprehensive examination of the District's delivery of educational services to students with disabilities. The Consultants were charged by the parties to assess whether the District is operating in compliance with special education laws. To the extent the Consultants found the District to be non-compliant they were required by the parties to make recommendations on all actions required to return the District to meaningful compliance. The Consultants were also charged to make recommendations on internal administrative mechanisms to ensure that the District: (a) implements all corrective actions agreed to by the parties; and (b) thereafter remains in compliance with all laws affecting students with disabilities.

As a preliminary matter, a few comments are in order concerning what has developed into a rather remarkable process of dispute resolution and internal review by the District, all under the supervision of a United States District Judge. The manner in which Judge Laughlin E. Waters has supervised the case has enabled the parties to negotiate an interim settlement agreement, timely conduct a complete and independent evaluation of the problem, and set a framework for a final agreement, all in the best interests of students with disabilities.

Next, the District has acted in good faith. Throughout this process the District has been proactive in dealing with the problems raised by the lawsuit. It has acknowledged its absolute obligation to comply with special education laws in every respect and provided the Consultants with exceptional access to top administrators and District personnel, facilities and operations. As a result of the District's good faith, this process of internal

review became a cooperative venture to improve educational services to students with disabilities.

Over a ten month period the Consultants examined the scope and quality of the District's special education policies, procedures, practices and operations. The Consultants reviewed a multitude of documents including special education bulletins, policies, procedures, general and special education forms, student records, compliance reports and complaints, budgets, and other documentation. The Consultants interviewed a plethora of District personnel at all levels ranging from top general education and special education administrators to school site enrollment clerks. The Consultants interviewed parents and conducted focus groups with principals and enrollment clerks. They compiled data on the District's special education operations and measured it against comparable data compiled from other large California school districts. The Consultants regularly met with each other and the parties to review the progress of their work and to coordinate and ensure the flow of accurate information to their teams.

B. Findings.

Between them Dr. Barber and Dr. Kerr have provided special and general education consulting services to several multi-ethnic metropolitan school districts, including New York, Pittsburgh, Cincinnati, Nashville, and San Diego, to name a few. They are therefore particularly familiar with the problems peculiar to school districts as large and as diverse as the Los Angeles Unified School District. Nonetheless, both Consultants are compelled to

conclude that the District suffers from a pervasive, substantial and systemic inability to deliver special education services in compliance with special education laws. The root causes of this dysfunction lie in three major factors.

First, when the District articulates and implements its educational mission it systematically and repeatedly fails to take into account its particular obligation to serve students with disabilities.

Second, the District is permeated with longstanding traditions and well-entrenched practices that marginalize the delivery of special education programs and services. Among other things, this includes a systemic failure to recognize that the education of students with disabilities is the responsibility of the entire District – general education as well as special education.

Third, while there are District personnel making good faith efforts, there is no District structure or internal oversight mechanism to ensure that special education programs and services are governed, managed and operated in compliance with the law. There are serious limitations with respect to accountability for the timely and appropriate delivery of special education services. At the same time, many administrators, field personnel, teachers and staff – unaware of their obligations concerning compliance – engage in substantial and repeated violations of laws for which they are not held accountable.

These deficiencies have resulted in specific items of material noncompliance as follows:

1. The District does not make a sufficient effort to search for, identify and serve eligible students with disabilities;

2. The District fails to identify, assess and serve students with disabilities within the timelines set by law;

3. The District's Designated Instructional Services are not operated in compliance with special education timelines and caseload limitations.

4. The District has failed to provide effective staff development to ensure that all District personnel can execute their obligations under the law to students with disabilities;

5. The District cannot readily track its students or their educational history and is not otherwise in compliance with respect to the maintenance of and access to student records;

6. The District cannot resolve issues involving the disproportionate identification (over and under) of students by ethnicity;

7. The District is not in compliance with respect to ensuring the meaningful representation, participation and informed consent of parents;

8. The District lacks the structure and mechanisms to ensure compliance with the legal mandates concerning least restrictive environment;

9. The District lacks a mechanism for planning, developing and maintaining a comprehensive focus on matriculation, facilities, transportation and transition concerns;

10. The district's personnel policies and practices result in substantial and repeated failure to deliver special education services, as required by law; and

11. The District is not in compliance with respect to the administrative and managerial allocation of special education resources.

These shortcomings are systemic and are not the sole responsibility of any one individual or group of individuals within the District. Indeed, there are individual administrators, certificated and classified personnel who are working hard to comply with the law and appropriately deliver special education services to students with disabilities. It would be a mistake of the greatest magnitude to focus on assigning blame for the District's non-compliance without first curing its systemic deficiencies in delivering special education services.

It must be emphasized that IDEA,[1] Section 504[2] and the special education provisions of the California Education Code are not merely legal mandates. They are also blueprints and a compass for ensuring that students with disabilities are not isolated or ignored. A school district out of compliance is off course and cannot, as a professional matter, claim to be meeting the educational needs of its students with disabilities.

---

[1] Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq.* ("IDEA").

[2] Rehabilitation Act of 1973, as amended 29 U.S.C. Section 794 (791, 1992 P.L. 102-569) ("Section 504").

C. Consequences of Non-Compliance.

The consequences of non-compliance are severe. They are most immediately felt by students with disabilities who often suffer substantial and permanent injury from lost time learning, continued isolation and marginalization, and loss of services absolutely essential to their health and growth. The harm suffered by children with disabilities, their parents and their communities as a result of systemic non-compliance is incalculable, tragic and unacceptable.

For that reason there are extremely severe consequences to school districts for non-compliance. Under IDEA, the U.S. Department of Education may withhold federal special education funding not only from an offending school district, but from the school district's entire state as well. It should be noted that the United States Department of Education Office ("U.S.DOE") recently investigated the District's compliance with certain special education laws, in particular, the obligation to conduct three year reevaluations of students with disabilities on a timely basis. The U.S.DOE found the District to be out of compliance and found the violations to be so substantial that it has threatened to: (a) withhold IDEA funding to the entire State of California unless the California Department Education ("CDE") takes prompt action to correct the situation; and (b) conduct a federal audit of the District's compliance with special education laws. In the District's case, the federal special education sums involved amount to approximately $27 million a year.

In addition, under state law the CDE may assume control of a school district's budget and special education operations or otherwise withhold state special education funding for pervasive and continuous non-compliance. In the District's case the state special education sums involved approximate $268 million per year. Under Section 504 federal judges may also take all equitable measures necessary to ensure compliance, including the appointment of a magistrate, referee or marshall to administer a school district's special education operations until the court is assured that the school district has returned to and will remain in compliance with special education laws.

As serious as the District's compliance deficiencies may be, however, they can be corrected within a reasonable period of time by: (a) making compliance with special education laws an absolute priority; (b) reinstating sound budgeting, management and personnel principles, policies and practices; (c) using readily available and proven technologies to return to and remain in compliance and efficiently manage the delivery of special education services.

D. Recommendations.

The extent and systemic nature of the District's noncompliance requires a comprehensive set of recommendations to ensure a return to compliance. The Interim Settlement Agreement requires the Consultants to identify those recommendations which are required for compliance and those which are not. All recommendations set

forth in this report are required for compliance. The Consultants' recommendations are as follows:

1. The Board of Education and Superintendent must: (a) articulate a commitment to serve the needs of students with disabilities as required by law; (b) ensure that District policies and procedures designed to carry out this commitment are disseminated not only to every school site, but also to all personnel affected by or charged with carrying out such policies and procedures; and (c) ensure that such policies and practices are implemented and enforced.

2. The District's top special education administrator must have the title and authority of an assistant superintendent commensurate with those administrators providing comparable direction and support to the District's general education programs. In addition, other top special education administrator positions must be aligned in authority and compensation with the District's general education program to enable them to ensure that special education programs and services are delivered in compliance with the law. This is necessary to ensure that special education concerns and issues are adequately considered within the administration of the District as a whole. The District's top special education administrator must also:

a. Be part of any inner circle of top administrators making core decisions concerning the District as a whole;

b. Control the development and implementation of the budget for the provision of special education services and

related programs to the District's student population;

c. Have the ability to ensure that special education funds are properly spent on special education services; and

d. Possess the authority to direct and allocate all resources and personnel necessary to ensure compliance or correct any non-compliance which may occur.

3. The administration of special education services must be consolidated and restructured to ensure compliance with the law at all levels in the delivery of services to children with disabilities. At a minimum, the restructuring must include the following elements:

a. The integration of special education programs, operations and services into the general education administrative structure of the District at all levels;

b. The consolidation of resources and personnel to ensure performance of special education obligations;

c. Internal administrative mechanisms to ensure compliance, including but not limited to timeline compliance;

d. A special education management information system to track compliance with timelines, to ensure future compliance, to hold District personnel at all levels accountable for compliance, to track ethnicity, and to otherwise assist in the management of the delivery of special education services; and

e. Mechanisms for ensuring that special education services, programs, and personnel are fully integrated with general education.

4. The District must revise and update its special education policies, procedures, practices and forms relating to the delivery of special education services in general, including its "search and serve" obligations under the law. This includes revising the District's enrollment form, referral form, Individual Education Plan ("IEP") form and procedures for implementing the terms and conditions of each student's IEP.

5. The District must also review its Speech and Language Services to bring it into compliance with respect to the caseloads for speech and language specialists including the number of personnel providing coordinating services. The District also needs to ensure that all IEP meetings are conducted with appropriate staff in attendance, including an administrator or administrative designee.

6. The District must review its Local Plan to ensure that all of its provisions are consistent with the requirements of California and Federal special education laws and regulations. The District must also review its Local Plan for any inconsistencies between the Local Plan and actual practices on each school site.

7. The District must ensure implementation of Behavioral Intervention Plans for all students in need of such strategies consistent with the purpose and requirements of the Hughes Bill.

8. The District must conduct occupational and physical therapy assessments within timelines as required by law. The District must also ensure the timely delivery of occupational and physical therapy to all students whose IEPs indicate that such services are appropriate.

9. The District must ensure that IEPs for NPS students placed in dual programs are implemented in a timely manner. The District must also review and develop policies and procedures regarding dual programs to ensure appropriate delivery of services.

10. The District must review and revise its policies and procedures with respect to student discipline, including but not limited to suspensions, expulsions, and intra-district transfers (including "opportunity transfers"). The District must develop and implement, on a regular basis, a comprehensive staff development training program to ensure that these policies and procedures are up-to-day with federal and state law. This staff development must be offered to all who are involved in student disciplinary actions, including paraprofessionals as well as professionals.

11. The District must that Section 504 of the Rehabilitation Act, special education procedures under IDEA, and state law are coordinated at the school site level and communicated effectively to parents and school personnel.

12. The District must establish and operate Student Study Teams or their equivalent at every school site in the District. The District must also ensure that Student Study Teams, or their equivalents, review the eucatonal program and needs of every student referred to them on

a timely basis and operate in accordance with procedures established by the District.

13. The Consultants wish to emphasize that the *sine qua non* to returning the District to compliance with special education laws and regulations lies in: (1) centralizing and computerizing all educational records of all District students; and (2) developing and installing a comprehensive special education management information system.

The centralized computerization of student records must be able to perform the following tasks:

a. Store all educational records of every student in the District including all biographical data, all enrollment forms, the student's cumulative record, all grades, all disciplinary records, all referrals to any Student Study Team or its equivalent, and all referrals for special education assessment;

b. Collect, display and analyze all demographic and other statistical data concerning the District's student population;

c. Track referrals of students to special education by ethnicity, gender, age, geography, school and classroom;

d. Track referrals to special education by individual administrators, teachers and other certificated personnel; and

e. Permit student records to be updated by and accessible to the appropriate District personnel at every school site;

In addition to these tasks, the District's computer system must be able to generate data for and otherwise

provide a special education management information system with the ability to:

a. Store all education records of every special educational student in the District including referrals for assessment, assessment data, IEPs, and all other information necessary to enable the District to electronically track every such student;

b. Track compliance timelines for each special education student;

c. Permit special education student records to be updated by an accessible to the appropriate District personnel at every school site;

d. Permit the tracking and monitoring of compliance with special education timelines and other laws and regulations by student, classroom, school site, cluster and the District as a whole;

e. Permit special education administrators and compliance officers to create and generate statistical and management reports as may be required to monitor and ensure compliance with special education laws and regulations; and

f. To the extent not already specified above, accomplish each of the tasks and meet the data requirements specified in the document attached to the Appendix of Exhibits as Exhibit "11."

The Consultants cannot over-emphasize the importance of these recommendations as the District will not

otherwise be able to return to, ensure or maintain compliance without them.

14. The District must provide families with the information they need to effectively support the education of a child with disabilities. This includes providing clear explanations to help parents: (a) better understand the nature of their child's disability and educational needs; and (b) effectively participate in the development of their child's IEP.

15. The District must in-service the Board of Education, the Superintendent, all administrators, and all other certificated and classified personnel on the legal and professional obligations to students with disabilities under the law on a regular basis. The District must also conduct annual training and other in-service on special education matters as required by law. The District must ensure that teachers have input in the design of staff development programs for instructional personnel. The District must also make positive efforts to ensure that individuals with exceptional needs and parents of such individuals are involved in the design and implementation of staff development programs.

16. The District must develop and implement programs and services for students with disabilities which emphasize the education of all students in the least restrictive environment. This should include policies, procedures and programs which provide for a full range of educational opportunities and which include the participation of parents in the decision-making process concerning the appropriate placement for the individual student. The District must

ensure that a full continuum of special education services is provided for students with disabilities at public school sites as close to the home of such students as possible.

17. The District must ensure that special education students are not discriminated against in their access to, and that a full continuum of special education services is provided by, School Based Coordination Act schools, magnet schools, and LEARN schools.

18. The District must also, over a period of time, achieve reduction in the number of the District's segregated sites and a concomitant increase in less restrictive program sites to comply with the mandate of least restrictive environment.

19. The District must design and develop a plan that ensures special education students are fairly, adequately and appropriately served with respect to facility allocations of space, transportation services, student transfers, suspensions and expulsions, matriculation, feeder patterns, and the continuum of special education programs and services.

20. The District needs to make a commitment for the provision of adequate and appropriate space for special education programs and services at every school site.

21. With respect to transportation issues the District should review the current length of time that students ride school buses, as well as the length of time that students may sit on school buses after arrival at school sites in order to ensure that students do not spend too lengthy a time waiting to begin their school program. In

addition, transportation should be reviewed with respect to the provision of Least Restrictive Environment and that programs are offered on campuses close to students' homes. The District must also ensure that information concerning the District's Dispute Resolution Procedures for Transportation Issues is included within information disseminated to parents and others on an annual basis.

22. With respect to transition issues in particular, the Consultants concur with the recommendation made by the 1993 Blue Ribbon Committee that the District should implement a:

> " . . . mechanism for planning, developing, and maintaining a comprehensive focus on transition concerns. Examples of focus include concerns about (a) welcoming and providing social support for new arrivals, (b) before and after school activity, (c) articulation in moving to the next level of schooling, (d) vocational and college counseling, (e) transition into or out of special education, and (f) transition to post school living."

23. The District must revise its personnel policies and practices to ensure the accountability of all personnel for consistent compliance with special education laws. A comprehensive set of objective, outcome-based standards must be developed for assessing the performance of all staff with respect to compliance obligations. At the same time, a comprehensive set of incentives should be developed to reward consistent compliance and induce others to appreciate the importance of delivering services to students with disabilities.

24. The District must revise its personnel policies and practices to ensure an adequate number of appropriately qualified special education staff and devise and implement practices that ensure the appropriate utilization of substitutes. These steps include:

a. Recruiting and hiring more credentialed special education personnel which should include a nationwide recruitment effort;

b. Creating an effective and comprehensive staff development program to ensure that all teachers have a better understanding of their compliance obligations;

c. Providing and creating an intra-district special education certificate program implementing an intra-district special education training program;

d. Continuing to support and expand as appropriate the District's Special Education Intern Program; and

e. Reviewing current practices relating to the maintenance and enhancement of comprehensive training for new special education teachers and retraining for veteran instructional personnel as appropriate.

25. The District must review the allocation of resources to ensure the availability of appropriate programs and services to students with exceptional needs. Specifically:

a. The District must address the loadings for DIS settings. The District's loadings for DIS services are below appropriate levels for unduplicated services and higher

than appropriate for duplicated services. As a result, the District must review its DIS programs and services to ensure that they are provided in accordance with the California Education Code. In addition, the District should review DIS programs and services provided to students on an unduplicated basis to ensure that resources and state funding are maximized;

b. The District must immediately begin a process to transition special day class programs to less restrictive resource specialist or DIS program settings. This process, at a minimum, must include the following:

(i) The training of regular and special education staff to ensure the appropriate inclusion of special education students within less restrictive settings;

(ii) During annual reviews, the IEPs of special day class pupils should be reviewed to determine if a less restrictive setting would be appropriate for the individual student;

(iii) The training of resource specialists to ensure that adequately trained and qualified staff are available and employed to deliver services in accordance with each student's IEP;

(iv) Developing and implementing a process leading to an increased number of instructional personnel possessing the Resource Specialist Certificate of Competence; and

(v) A careful review of the manner in which Resource Specialist and DIS programs/devices are delivered to students, and consideration of creative and innovative approaches to enhancing such programs; and

c. The District should seek to increase caps on certain special day class sizes in order to expand the options available to the District to enable it to return to and remain in compliance. Any caps on class sizes should be driven by the needs of student with disabilities and not any inflexible standard.

26. The District must review its special education budgeting practices and audit its special education finances and programs on an ongoing basis. The District must also take all steps necessary to maximize revenue from state and federal sources. More specifically:

a. The District must conduct independent audits of the special education budget and items causing encroachment on the District's general fund to ensure: (i) that such items are necessary to deliver appropriate special education services in compliance with the law; (ii) that such items are not more properly categorized as general education expenditures; (iii) that the District has maximized financial resources; (iv) that cost containment practices and internal control mechanisms have been put in place; and (v) that funds are being expended in accordance with legal parameters;

b. The District should conduct an ongoing independent program audits of the

District's special education program to determine if the state is exceeding state and federal mandates. Areas that may be explored more fully may include the District's staff physicians, the staffing of DIS services and the number of personnel providing coordinating/supervisory functions and not otherwise providing direct services to students;

c. The District should review its 1994-95 J-50 document to determine if the District maximized special education funding. Any increased funding generated would be used to offset the loss anticipated from any unfunded units for 1995-96;

d. The District should conduct a thorough review of all IPS units and current loadings together with the Special Education Director, Unit Coordinators, and other appropriate staff to determine whether any classes/programs can be consolidated and/or reduced to lessen the number of any unfunded units;

e. The District should design and implement a process which assures that growth calculations, including an understanding of all parameters, is undertaken prior to any employment of new staff for the 1996-97 fiscal year, and beyond; and

f. The District should seek public and private grants and pursue Medi-Cal billing on a more aggressive basis.

II. THE ORIGIN AND INTERIM SETTLEMENT OF THE CHANDA SMITH LITIGATION

In November, 1993 the ACLU Foundation of Southern California and the law firm of Newman.Aaranson. Vanaman filed a class action lawsuit on behalf of certain District students with disabilities alleging that the District had failed to comply with its special education obligations under IDEA, Section 504 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. More specifically, the plaintiffs alleged that the District had pervasively and continuously failed to search for, identify, track, and timely and properly serve the educational needs of children with disabilities.

The District denied the allegations of the complaint but at the same time invited plaintiffs to explore the possibility of narrowing the issues if not actually settling the case. The parties agreed to a multi-step approach to resolving the dispute. First, the plaintiffs submitted a list of specific areas where they contended the District was violating the special education laws, together with a list of recommended policy and practice changes. The District responded by agreeing to the relief sought by the plaintiffs that the District's counsel determined was required by law, and rejecting each of the plaintiffs' requests which the District's counsel determined was not required by law. Plaintiffs' counsel agreed that some of their requests were beyond the scope of services or conduct required of the District by law – although they asserted that the proposals would effectively remediate the problems alleged in their complaint.

There were, however, areas where counsel for both sides disagreed on the scope of the problem, the requirements of the law, and the remedial measures required. Instead of suffering the expense of discovery and risk of trial, the parties agreed to retain expert consultants to investigate the issues, make findings concerning the District's compliance with special education laws, and make non-binding recommendations as to steps the District should take to meaningfully improve service to students with disabilities within the boundaries of the special education laws. The parties would then review and comment on the findings and recommendations, conclude a final settlement agreement and otherwise resolve the litigation.

The parties also agreed that the consultants should review, analyze and make recommendations on special education policies, forms, procedures, practices, operations and any internal administrative mechanisms needed to ensure compliance with all applicable regulations and laws. The net result was that the parties memorialized their agreement in the Interim Settlement Agreement approved by United States District Judge Laughlin E. Waters. A copy of the Interim Settlement Agreement is attached to the Appendix of Exhibits accompanying this report as Exhibit 1.[3]

The procedure and timeline for completing this settlement process is as follows:

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[3] Hereafter, a reference to any exhibit shall be a reference to an exhibit contained in the Appendix of Exhibits.

A. On or before October 15, 1995 the Consultants are to deliver their second report to the parties;[4]

B. By October 31, 1995, the parties and their counsel will have reviewed and commented on the Consultants' reports and reached final agreement on the implementation of the recommendations set forth therein;

C. From November 1 through November 30, 1995, the Board of Education will review and take a vote on conditional approval of the final agreement. If the final agreement is so approved, the District will conduct public hearings on the final agreement;

D. Public hearings on the final agreement will be conducted between December 1, 1995 and January 31, 1996;

E. From February 1, 1996 through February 28, 1996, the Board of Education will take final action on the final agreement after considering the results of the public hearings; and

F. Thereafter, the Court will schedule hearings to approve the final agreement.

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[4] The original schedule set forth in the Interim Settlement Agreement has been modified pursuant to Court Orders dated March 21, 1995 and June 27, 1995.

* * *

physical therapists. Although the services provided by these professionals are a critical and inextricable part of the special education delivery system, none of these professionals report to nor can be directed by the Special Education Division, there is no mechanism to ensure that they are spending their time delivering special education services, and none of them are otherwise held accountable for compliance with special education laws. In addition, special education funds are being used for non-special education purposes. For example, 100% of the costs of **all** of the Psychological Services Division's administrators and senior psychologists were charged to the special education budget even though only 60% of the Division's full time psychologist positions were funded by special education.

The $3,600,000 controlled by the Budget Division includes support, $60,000 for a senior auditor position to conduct audit of non-public schools, and $3,540,000 for other charges. The purpose of the senior auditor position is to audit non-public schools. The problem, however, is that the Budget Division has not conducted any significant audits of non-public schools. The consultants have not yet been able to determine what the "other charges" represents.

The $1,300,000 controlled by the Information Technology Division includes $260,000 in salaries and benefits for one trainer, one senior systems/program analyst, one systems/program analyst, one assistant systems/program analyst, and one operating systems specialist. A

portion of the $1,300,000 is charged to the Special Education Division in a "force account" for allocated expenditures – including the maintenance of the system and software.

The fundamental problem of providing special education resources to administrators who are not accountable for special education compliance is that such resources will almost invariably be used to help the such [sic] administrators meet their highest priorities, **which may or may not include the delivery of special education services.**

The $63.3 million controlled by the Business Services Division includes allocations for transportation, auto maintenance, bus drivers, private buses during the regular school year (22.5 million), private buses during the summer (2.4 million), a transportation planner, accounting and personnel clerks and other support personnel. The problem here is that administrators of the District's special education transportation services are not held accountable for compliance. Unit coordinators reported that they often made placement decisions based, not on the needs of the students, but on the availability of transportation. A special education system driven by the needs of the students with disabilities requires mechanisms to ensure that (1) the appropriate amounts of resources are allocated for special education transportation; and (2) that such resources are deployed with an appropriate regard for compliance with the law.[45] The

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[45] While the Consultants have not yet examined the sufficiency of the District's transportation services to students

District does not currently have these mechanisms in place.

The $22.4 million controlled by the Student Support Services Division includes salary and benefits for school psychologists, nurses, counselors, occupational therapists and

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with disabilities, they have been able to determine that the managers of such services are not held administratively accountable for special education compliance.

Supreme Court, U.S.
FILED
JAN 15 1997
CLERK

No. 96-965

In The

Supreme Court of the United States

October Term, 1996

SHEILA HOPPER, ex rel.,
UNITED STATES OF AMERICA,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, WILLIAM ANTON, LEONARD BRITTON, PAUL CARR, PHILLIP CALLISON, JAMES ESTERLE, DEANNE NEIMAN, BENITA CHAUM, CAROL ALBRIGHT, and JACKIE THOMPSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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21 pp

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in finding that there was no evidence that Respondents made a false claim under the False Claims Act?

2. Did the Ninth Circuit err in finding that the "whistleblower" provision of the False Claims Act does not extend to Petitioner because her acts had no nexus to the False Claims Act?

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BRIEF IN OPPOSITION

Respondents Los Angeles Unified School District, William Anton, Leonard Britton, Paul Carr, Phillip Callison, James Esterle, Deanne Neiman, Benita Chaum, Carol Albright, and Jacklyn Thompson respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals' decision in this case.

STATEMENT OF THE CASE

Petitioner Sheila Hopper is a special education teacher employed by Respondent Los Angeles Unified School District (the "School District"), one of the largest public school districts in the United States.[1] Between 1989 and 1991, Petitioner filed several administrative complaints with the California State Department of Education ("CDE") and the United States Department of Education Office of Civil Rights ("OCR") to compel the School District's compliance with certain state and federal special education laws and regulations. (SER tab 1, ER pp. 83-115).[2] The CDE and OCR found some of Petitioner's complaints to have merit (SER tab 12) and the School District took the corrective actions necessary to return to

[1] The other Respondents are School District administrators.

[2] Citations to the record below are designated herein as follows: Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit and are to the page number. Citations to "SER" are to Respondents' Supplemental Excerpts of Record before the Ninth Circuit and are to tab number. Citations to "App." are to the Appendix of the Petition for Certiorari.

compliance. (ER pp. 108, 293, 305-06). None of these complaints nor any of the findings by the CDE or OCR had anything to do with fraud or false claims for federal funds. (SER tab 1, ER pp. 83-115).

Beginning in March 1990, Respondent Jacklyn Thompson ("Thompson"), a School District elementary school principal, received several complaints about Petitioner, including allegations of child abuse, impermissible corporal punishment, and the improper alteration of a child's school schedule.

Thompson investigated the complaints, determined that disciplinary action against Petitioner was required and recommended to her superiors that Petitioner be given a written reprimand. (SER tabs 15 and 16). Thompson's superiors at the School District disagreed and dictated that Petitioner be suspended for fifteen days without pay. (SER tabs 15 and 16).

In April 1993, Petitioner filed this action alleging that her administrative complaints demonstrated that the School District, as well as Thompson and other School District administrators, had fraudulently obtained federal special education funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA") in violation of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). Appellant also alleged a claim for retaliation under 31 U.S.C. § 3730(h), the "whistle blower" provision of the FCA. (ER pp. 147-156).

A. Legislative Scheme of IDEA.

The express legislative purpose of IDEA is to provide states and localities with financial assistance for the provision of educational programs and related services to students with disabilities. 20 U.S.C. § 1400(c). Under IDEA school districts are entitled to supplementary special education funding from the federal government. 20 U.S.C. § 1400 *et seq.* The District's annual special education budget exceeds $537 million and serves almost 64,000 disabled children every year. (SER tabs 9, 11 and ER p. 300). Of this amount, only 0.05% comes from the federal government. *Id.* The School District allocates $150 million from its general fund to ensure that its special education programs and services are operated in compliance with all applicable laws. (SER tabs 9 and 11, ER p. 300).

The federal government annually grants IDEA funding to each state. 20 U.S.C. §§ 1411(a)(1) and 1413. Each school district then applies to the state for its share of IDEA funding. 20 U.S.C. § 1414(a). The California Department of Education administers California's share of IDEA funds as well as distribution of the state's own special education funds. It annually allocates 75% of these funds to California school districts based on formulae related to the number of children enrolled in their special education programs during the prior year. 20 U.S.C. § 1411(d). Every school district provides this information to CDE four times a year, in a J-50 form and, at the end of the school year, in a J-380 form. Neither form contains any

representation or certification concerning the School District's compliance with state and federal special education mandates. (SER tabs 9 and 11, ER pp. 484-87).

Under IDEA, each state is responsible for ensuring compliance with special education mandates. 20 U.S.C. §§ 1412 and 1414. Thus, CDE regularly monitors such compliance and, based on its own periodic review and inspection of each school district's procedures and practices, determines whether a school district's compliance is satisfactory. (SER tab 9 and ER pp. 301-02). Neither CDE nor the federal government requires school districts to certify that it has complied in the past or is currently in compliance with state and federal special education mandates as a prerequisite to the annual disbursement of IDEA funds. (SER tabs 9 and 11, ER pp. 292, 301-02).

As part of its regulatory structure, CDE requires school districts to submit a Local Plan for Special Education ("Local Plan") every three years. CDE reviews the Local Plan to insure that it meets the requirements of state and federal special education mandates. As part of the Local Plan, each school district provides a Certification of Participation, Compatibility, and Compliance Assurances ("Certification of Assurances") signed by the school district's superintendent wherein the school district certifies that it: " . . . will meet all applicable requirements of state and federal laws and regulations, including ***general*** compliance with Public Law 94-142, Section 504 of Public Law 93-112, and the provisions of

the California Education Code, Part 30. . . . " (ER pp. 54-5) (emphasis added).[3]

Because IDEA requires that every student with an eligible disability be given a free appropriate public education, if even one of the School District's 640,000 students is erroneously denied special education services, the School District would be in technical noncompliance with IDEA. The Certification of Assurances, however, refers to "general compliance," not perfect compliance.

Every three years CDE conducts a comprehensive coordinated review and inspection of each school district's compliance with the state and federal special education mandates. If items of noncompliance are identified, the school district presents a plan for remediation of such items and CDE monitors the school district to ensure that the remediation actually takes place. (SER tab 9 and ER p. 293).

CDE conducted compliance reviews of the School District in 1987, 1990 and 1993. In each case all items of noncompliance were remedied to the satisfaction of the CDE and the School District was determined to be in compliance with all special education mandates. (SER tab 9 and ER pp. 293, 299-300).

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[3] Public Law 94-142 is the predecessor of, and was superseded by, the passage of IDEA. Individuals with Disabilities Act, Pub.L. 94-142, § 8, 89 Stat. 796 (1975). California Education Code, Part 30, is found at Cal. Educ. Code § 56333 (West 1996).

B. Procedural History.

Petitioner filed suit on or about April 28, 1993. (ER p. 74). In September 1994 the School District moved for summary judgment on Petitioner's FCA and retaliation claims. (ER pp. 218-23). The district court granted the School District's motion for summary judgment on the FCA claim but denied its motion for summary judgment on the retaliation claim. (App. 26-32).

Petitioner's retaliation claim came on for trial on November 8, 1994. At the close of evidence, the School District's motion for a directed verdict was denied. (SER tab 22). The jury subsequently returned a special verdict in which it found that Petitioner's administrative complaints were in furtherance of a FCA action and that Thompson, but no other administrator, had retaliated against Petitioner on account of those administrative complaints. (ER pp. 701-03). The jury awarded appellant $50,000 in compensatory damages. (App. 33-34). Respondents' motion for judgment as a matter of law was denied on January 23, 1995. (App. 37-40).

Petitioner filed a Notice of Appeal of the grant of Respondents' summary judgment motion on the FCA claim on February 17, 1995; on March 8, 1995, the School District and Thompson cross-appealed the district court's denial of their motion for judgment as a matter of law on the retaliation issue. The Ninth Circuit upheld the district court's ruling on the summary judgment motion but reversed the district court's denial of judgment as a matter of law on the retaliation issue. On September 13, 1996, Petitioner's petition for rehearing and suggestion for rehearing en banc were denied by the Ninth Circuit, with

no judge of the court requesting a vote on Petitioner's suggestion for rehearing en banc. (App. 41-42).

REASONS FOR DENYING THE WRIT

This case represents an attempt by Petitioner to: (i) broaden the scope of the FCA to cover instances of regulatory noncompliance in the absence of fraud or false claims; and (ii) broaden the "whistleblower" protections of Section 3730(h) of the FCA to protect activities that had nothing to do with an investigation of fraud. Petitioner, however, points to no conflict with this Court's precedents, no actual conflict with the decision of any other circuit, nor any other compelling basis for this Court's review.

A. The Ninth Circuit Is Not in Conflict with Any Other Circuit in Holding That the "Whistleblower" Protection of the FCA Does Not Extend to Petitioner Because She Was Not Investigating Fraud; Petitioner Cites Only *Neal v. Honeywell* for a Possible Conflict but That Case Involved a Plaintiff Who Was in Fact Investigating Fraud

Petitioner argues in support of her writ petition that the Ninth Circuit's decision in this case conflicts with other circuits in two ways. As to the retaliation count, Petitioner asserts that the Ninth Circuit's decision is in conflict with *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), which held that a plaintiff who investigated fraud was entitled to the "whistleblower" protections of Section

3730(h) even though her employer settled with the United States before plaintiff could file an FCA action.[4]

Petitioner argues that because Petitioner actually filed an FCA action, she is entitled to at least as much protection as the plaintiff in *Neal*. This asserted conflict with *Neal* is illusory, however, because the Ninth Circuit based its decision on its finding that Petitioner's "investigatory activity did not have any nexus to the FCA." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). Moreover, according to the Ninth Circuit, "the record quite clearly shows [Petitioner] was merely attempting to get the School District to comply with Federal and State regulations. . . . She was not investigating fraud. She was not whistleblowing as envisioned in the paradigm qui tam FCA action. [Citation omitted]." *Id.* There is nothing about this finding that contradicts the holding in *Neal* or the opinion of any other circuit.

B. The Ninth Circuit Is Not in Conflict with Any Other Circuit in Affirming Summary Judgment Where There Was No Evidence of Fraud; Petitioner Cites Only *United States v. Veneziale* for a Possible Conflict but That Case Involved an Actual Fraudulent Misrepresentation

Petitioner also argues that the Ninth Circuit's opinion upholding summary judgment on the FCA claim conflicts

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[4] The court in *Neal* concluded that the plaintiff's investigation warranted the "whistleblower" protection of the FCA because "Neal's report was not a figment of her imagination; two guilty pleas and a hefty settlement show that civil litigation [under the FCA] was a real possibility." *Neal*, 33 F.3d at 864.

with "other circuits" in general and the Third Circuit's opinion in *United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1956), in particular, because the Ninth Circuit declined to interpret "false claim" so broadly as to include mere regulatory noncompliance in the absence of any affirmative misrepresentation. (Petition for Certiorari, p. 13). However, there is nothing in *Veneziale* that could possibly be construed to conflict with the Ninth Circuit's opinion. In *Veneziale*, the Third Circuit held that a fraudulent misrepresentation which induced the government to guarantee a loan was actionable under the FCA when the government was forced to pay under its guaranty even though the wrongdoer neither sought nor obtained any transfer of funds to himself. *Veneziale*, 268 F.2d at 505-06. In the instant case, the Ninth Circuit affirmed the trial court's grant of summary judgment because of the ***absence of any*** misrepresentation by the School District. *Hopper*, 91 F.3d at 1266-67. Petitioner cites no other circuit cases that conflict with the Ninth Circuit's decision on this issue.

C. There Are No Important Federal Issues to Be Addressed by the Court in This Case and Petitioner's Assertions To the Contrary Are Wrong Because She Misinterprets: (i) the Funding Requirements of IDEA; and (ii) the Basis for the Ninth Circuit's Decision on the Promissory Fraud Question

There are no important federal issues to be addressed by the Court in this case. Petitioner's assertions to the contrary are in error because she misinterprets the funding requirements of IDEA as well as the basis for the

Ninth Circuit's decision on the promissory fraud question.

1. The Ninth Circuit correctly found that IDEA does not require certification of compliance as a prerequisite for funding and Petitioner cites no authority to the contrary.

Petitioner's contention that the Ninth Circuit erroneously concluded that IDEA does not require certification of compliance with special education laws as a prerequisite to the receipt of special education funds is simply wrong. Plaintiff cites no language in IDEA or any other law that supports her assertion that certification of *past* compliance is a prerequisite for funding.

As to her assertion that certification of *future* compliance is a prerequisite to funding, Petitioner again finds no support in IDEA. Instead, she stretches the meaning of language found in Section 1414 of IDEA, which states that a local educational unit seeking its share of federal funds apportioned to the state shall submit an application to the state educational agency, which application shall provide satisfactory assurances as to how the special education funds will be used. 20 U.S.C. § 1414(a). Section 1414(b)(2)(A) of IDEA provides that in the event that the state educational agency, after notice and a hearing, finds that a school district failed to comply with any requirement in its application, the state shall make no further payment to the local school district. 20 U.S.C. § 1414(b)(2)(A). This language in IDEA is a far cry from a requirement that a school district certify future compliance as a precondition to federal funding. Furthermore,

there is no evidence in the record that the School District failed to provide "satisfactory assurances" in accordance with Section 1414 or that the State of California or the federal government ever determined that the School District's assurances were not satisfactory.

The issue is raised by Petitioner to support her argument that instances of past School District noncompliance gives rise to an inference of promissory fraud:

> [b]y definition, a false promise of compliance in the face of pervasive, ongoing noncompliance is not a "satisfactory assurance" of compliance under the IDEA, and thereby inherently "creates eligibility that would otherwise not exist." [Citation omitted].

(Petition for Certiorari, p. 20).

Apart from misstating the requirements of IDEA, Petitioner's argument depends upon her misstatement of the record before the district court and the Ninth Circuit with her assertion of "pervasive, ongoing noncompliance." The record in fact showed only instances of noncompliance.[5]

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[5] Petitioner's allegation of "eight straight years of District-wide non-compliance" is totally unsupported by the record. (Petition for Certiorari, p. 8). Moreover, Petitioner is misleading in implying that the consultant's report in *Chanda Smith v. Los Angeles Unified School District, et al.*, U.S.D.C. No. CV-93-7044-LEW (C.D.Cal.), addresses the "exact same factual allegations" as the instant case. (Petition for Certiorari, p. 7) Petitioner's allegations address the time period from 1989 to 1991 and deal primarily with the issue of teacher presence at Individual Education Program meetings. The consultants' report, which was issued ***one year after*** the summary judgment motion was

2. The Ninth Circuit correctly stated the FCA's scienter requirement in general and in the context of promissory fraud in particular, but in any event its analysis on this issue is *dicta* and not necessary to its holding.

Petitioner's claim that the Ninth Circuit misstated applicable law on the FCA's scienter requirement is similarly misplaced. Petitioner asserts that the Ninth Circuit erred in its analysis of promissory fraud when it stated that "[f]or a certified statement to be 'false' under the [FCA], it must be an intentional, palpable lie." *Hopper*, 91 F.3d at 1267. Petitioner's argument is misplaced for two reasons. First, the assertion is *dicta* and not necessary to the court's holding. The Ninth Circuit found that the School District's promises of future general compliance were not a prerequisite to the receipt of funds, and thus not " 'the cause of the Government's providing the benefit' [citing John T. Boese, *Civil False Claims and Qui Tam Actions* at 1-29 (1995)]." *Hopper*, 91 F.3d at 1267. Thus even if false, the promises were not actionable under the FCA. Indeed, the United States Attorney General, in its motion to clarify the Ninth Circuit's opinion, noted that the "intentional, palpable lie" language is found in *dicta* and is "in no way necessary to the panel's disposition of the case." (App. 139).

---

decided, addresses a broad range of issues pertaining to conditions at the School District as of October 1995. It does not address conditions at the School District during the period of 1989 to 1991. The Ninth Circuit correctly denied Petitioner's request for judicial notice of the *Chanda Smith* consultant's report and consent decree.

Second, Petitioner is wrong in asserting that the Ninth Circuit's *dicta* is in error. The court cited the correct scienter requirement, that there be "knowing fraud." *Hopper*, 91 F.3d at 1268. Moreover, the "intentional, palpable lie" language occurs in the promissory fraud context. While courts have found promissory fraud to be actionable in rare circumstances under the FCA, see *United States v. Shah*, 44 F.3d 285, 290 (5th Cir. 1995), it is hornbook law that for a promise to be actionable, it must have been false when made. See *Hopper*, 91 F.3d at 1267. Were this not the case, every breach of a contract with the United States could be actionable under the FCA.

D. Petitioner Does Not Argue That There Are Compelling Reasons for This Court To Consider Expanding the Reach of the FCA in This Case and There Are Compelling Policy Reasons for This Court To Decline To Do So

Perhaps most importantly, the Ninth Circuit's opinion is in accord with the policy and goals of both the FCA and IDEA. The FCA was intended to address fraudulent claims for governmental funds, not regulatory noncompliance. IDEA, on the other hand, has a comprehensive scheme for regulating compliance with its provisions. Petitioner, however, would have this Court overturn the Ninth Circuit and ignore IDEA to give bounty hunters the ability to use the FCA to police public agency compliance with governmental regulations. Petitioner has pointed to no compelling reasons justifying this unprecedented expansion of the FCA.

Indeed, the circumstances of this case indicate compelling policy reasons for following the plain language of IDEA and the FCA. In this case, the government has suffered no loss, for, as the Ninth Circuit pointed out, the School District not only spent 100% of its IDEA funding on special education, but spent many times more from its own fund for general education. *Hopper*, 91 F.3d at 1268. It would make no sense to divest the School District of hundreds of millions of dollars of badly needed funds and to pay Petitioner twenty-five to thirty percent of these funds pursuant to 31 U.S.C. § 3730(d) solely on account of alleged instances of regulatory noncompliance, particularly where there has been no fraud and where IDEA provides the mechanism for policing compliance.

Similarly, it would make no sense to subject the School District's personnel decisions to review under the FCA when Petitioner has not been able to show any nexus between her acts and fraud or false claims.

CONCLUSION

Petitioner has presented no conflict with the precedents of this Court or with the decisions of any other circuit, and presents no other compelling basis for this Court's review. Her request that this Court consider expanding the scope of the FCA so that bounty hunters may police public agency compliance with federal regulations, even where there is no evidence of fraud, should therefore be denied. In addition, her request that this Court consider expanding the "whistleblower" protection

of the FCA to protect acts having no nexus to the FCA should also be denied.

Respectfully submitted,

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